S. HRG. 100-519

FAIR HOUSING AMENDMENTS ACT OF 1987

HEARINGS

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

S. 558

A BILL TO AMEND TITLE VIII OF THE ACT COMMONLY CALLED THE CIVIL RIGHTS ACT OF 1968, TO REVISE THE PROCEDURES FOR THE ENFORCEMENT OF FAIR HOUSING, AND FOR OTHER PURPOSES

MARCH 31; APRIL 2, 7, 9; JUNE 9; AND JULY 1, 1987

Serial No. J-100-12

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

78-076 WASHINGTON : 1988

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S521-14

COMMITTEE ON THE JUDICIARY

JOSEPH R. BIDEN, JR., Delaware, *Chairman*

EDWARD M. KENNEDY, Massachusetts
ROBERT C. BYRD, West Virginia
HOWARD M. METZENBAUM, Ohio
DENNIS DECONCINI, Arizona
PATRICK J. LEAHY, Vermont
HOWELL HEFLIN, Alabama
PAUL SIMON, Illinois

STROM THURMOND, South Carolina
ORRIN G. HATCH, Utah
ALAN K. SIMPSON, Wyoming
CHARLES GRASSLEY, Iowa
ARLEN SPECTER, Pennsylvania
GORDON J. HUMPHREY, New Hampshire

MARK H. GITENSTEIN, *Chief Counsel*
DIANA HUFFMAN, *Staff Director*
DENNIS W. SHEDD, *Minority Chief Counsel*

SUBCOMMITTEE ON THE CONSTITUTION

PAUL SIMON, Illinois, *Chairman*

HOWARD M. METZENBAUM, Ohio
DENNIS DECONCINI, Arizona
EDWARD M. KENNEDY, Massachusetts

ARLEN SPECTER, Pennsylvania
ORRIN G. HATCH, Utah

DEBORAH LEAVY, *Chief Counsel and Staff Director*
JEFFREY ROBINSON, *Minority Chief Counsel*

CONTENTS

Hearings held on:

	Page
March 31, 1987	1
April 2, 1987	159
April 7, 1987	329
April 9, 1987	455
June 9, 1987	559
July 1, 1987	759

STATEMENTS OF SENATORS

Simon, Paul	1, 8, 159, 329, 559
Biden, Joseph R., Jr	6
Kennedy, Edward M	3, 9, 455, 560, 759
Hatch, Orrin G	5, 10, 330, 566, 760
Metzenbaum, Howard M	11
Specter, Arlen	2, 11, 329
Thurmond, Strom	574, 760

PROPOSED LEGISLATION

S. 558—To amend title VIII of the Act commonly called the Civil Rights Act of 1968, to revise the procedures for the enforcement of fair housing, and for other purposes 13

CHRONOLOGICAL LIST OF WITNESSES

MARCH 31, 1987

Pierce, Hon. Samuel R., Jr., Secretary, U.S. Department of Housing and Urban Development 49

Panel consisting of: Althea T.L. Simmons, director, Washington Bureau, National Association for the Advancement of Colored People; Raul Yzaguirre, president, National Council of La Raza; Irene Natividad, chair, National Women's Political Caucus; and Marca Bristo, president, National Centers on Independent Living 61

Panel consisting of: Robert Butters, associate counsel, National Association of Realtors; and Rodney A. Smolla, professor of law, University of Arkansas 108

APRIL 2, 1987

Panel consisting of: Robert Abrams, attorney general, State of New York; James B. Morales, staff attorney, Center for Youth Law; and Diana M. Pearce, director, Women and Poverty Project 160

Panel consisting of: Jordan C. Band, vice chairman, Community Relations Board, Cleveland, OH; Henry Hain, director, Housing Division, Pennsylvania Human Relations Commission; and Mary Rose Wilcox, member, City Council, Phoenix, AZ 226

Panel consisting of: Fletcher R. Hall, executive vice president, Greater Baltimore Board of Realtors; Randall Raynolds, president-elect, Illinois Association of Realtors; Alvin Pearson, president, Greater South Suburban Board of Realtors, Chicago, IL; Jacqueline Simon, realtor, Mimi Selig Homes, Inc., Rockville, MD; and T.L. Holmes, president, National Association of Real Estate Brokers 274

APRIL 7, 1987

Page

Reynolds, William Bradford, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice 331
Panel consisting of: Barbara Anderson, Cleveland, OH; Laetitia H. Pferdehirt, Pittsburgh, PA; Dianne Betsey, Silver Spring, MD; and Michael Wilson, member, Public Policy Committee, National Mental Health Association 361
Panel consisting of: Hon. Robert C. Weaver, former Secretary, Department of Housing and Urban Development; Drew S. Days III, Yale Law School; and Martin E. Sloane, executive vice president, National Committee Against Discrimination in Housing 381
Pendleton, Clarence M., Jr., Chairman, U.S. Commission on Civil Rights 442

APRIL 9, 1987

Panel consisting of: James W. Malone, bishop of Youngstown, OH, on behalf of the United States Catholic Conference; and Ronald L. Mace, president, Barrier Free Environments Inc 456
Levine, Jay Steven, attorney, North Palm Beach, FL 477
Panel consisting of: Bonnie Milstein, attorney, Washington, DC; and Robert G. Schwemm, professor of law, University of Kentucky Law School 520

JUNE 9, 1987

Panel consisting of: Arthur D. Wolf, professor of law, Western New England College School of Law, Springfield, MA; Paul D. Kamenar, executive legal director, Washington Legal Foundation, Washington, DC; Thomas D. Rowe, Jr., professor of law, Duke University School of Law, Durham, NC; and Richard R. Nageotte, Borinsky & Zelnick, Woodbridge, VA 585

JULY 1, 1987

Reynolds, William Bradford, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice 761
Hazard, Geoffrey C., Jr., Sterling professor of law, Yale Law School, New Haven, CT 837

ALPHABETICAL LISTING AND MATERIALS SUBMITTED

Abrams, Robert:
Testimony 160
Prepared statement 162
Anderson, Barbara:
Testimony 361
Prepared statement 363
Band, Jordan C.:
Testimony 226
Prepared statement 228
Betsey, Dianne:
Testimony 371
Prepared statement 372
Bristo, Marca:
Testimony 95
Prepared statement 98
Butters, Robert:
Testimony 108
Prepared statement 112
Days, Drew S. III:
Testimony 389
Prepared statement 391
Hain, Henry:
Testimony 234
Prepared statement of Homer C. Floyd, executive director, Pennsylvania Human Relations Commission 236
Hall, Fletcher R.:
Testimony 274
Prepared statement with exhibits 277
Hazard, Geoffrey C., Jr.:
Testimony 837

Page

Hazard, Geoffrey C., Jr.—Continued
Prepared statement 841
Holmes, T.L.:
Testimony 317
Prepared statement 320
Kamenar, Paul:
Testimony 609
Prepared statement 612
Law review article entitled "Administrative Penalties and the Civil Jury: The Supreme Court's Assault on the Seventh Amendment," by Roger W. Kirst 621
Responses to Senator's questions 705
Kennedy, Hon. Edward M.:
Letter from J. Michael Dorsey, general counsel, HUD, dated June 2, 1987 561
Enclosure: Letter to William Bradford Reynolds, Assistant Attorney General, Department of Justice, from Michael Dorsey, dated May 7, 1987 562
Levine, Jay Steven:
Testimony 477
Prepared statement 482
Court cases:
Franklin v. *Egret Condominium* 489
De La Paz v. *State of Florida* 498
White Egret Condominium v. *Franklin* 499
"Inside the Mature Market," by William Lazer, American Demographics 506
Newspaper article from the Orlando Sentinel, June 29, 1986 510
Letter to Senator Kennedy, dated April 24, 1987, with enclosure 511
Mace, Ronald L.:
Testimony 464
Prepared statement 468
Illustrations: Adaptive devices used by the handicapped 474
Malone, James W.:
Testimony 456
Prepared statement 459
Milstein, Bonnie:
Testimony 520
Prepared statement 522
Agency regulations implementing section 504 of the Rehabilitation Act 528
Morales, James B.:
Testimony 166
Prepared statement 169
Nageotte, Richard R.:
Testimony 690
Letter to Senator Hatch, dated May 28, 1987 692
Responses to Senator's questions 714, 752
Natividad, Irene:
Testimony 85
Prepared statement 87
Pearce, Diana M.:
Testimony 214
Prepared statement 217
Pearson, Alvin:
Testimony 304
Prepared statement 307
Pendleton, Clarence M., Jr.:
Testimony 442
Prepared statement 445
Pferdehirt, Laetitia H.:
Testimony 366
Prepared statement 369
Pierce, Hon. Samuel R., Jr.:
Testimony 49
Responses to questions submitted by Senator Biden 6
Raynolds, Randall:
Testimony 297
Prepared statement 300
Reynolds, William Bradford:
Testimony 331, 761

Page

Reynolds, William Bradford—Continued
Letter to Senator Simon, May 22, 1987 345
Prepared statement 351, 825
Memorandum concerning seventh amendment issues, from Larry A. Hammond, Deputy Assistant Attorney General, Office of Legal Counsel 776
Rowe, Thomas D.:
Testimony 684
Prepared statement 686
Responses to Senator's questions 721
Schwemm, Robert:
Testimony 529
Prepared statement with enclosure 532
Simmons, Althea T.L.:
Testimony 61
Prepared statement of Benjamin L. Hooks, chief executive officer executive director, NAACP 64
Simon, Jacqueline:
Testimony 311
Prepared statement 314
Simon, Hon. Paul:
Letter from Girardeau A. Spann, associate professor of law, Georgetown University Law Center, dated June 6, 1987 568
Prepared statement of Paul D. Carrington, dean, Duke University Law School 571
Sloane, Martin E.:
Testimony 401
Prepared statement with enclosure 403
Smolla, Rodney A.:
Testimony 133
Prepared statement 135
Thurmond, Hon. Strom:
Memorandum for Hon. Ruth T. Prokop, general counsel, HUD; re: constitutionality of section 810 of H.R. 3504, from Larry A. Hammon, Deputy Assistant Attorney General, Office of Legal Counsel 576
Letter to Janice Cooper, Esq., House Committee on the Judiciary, from Walter Gellhorn, university professor emeritus, Columbia University, dated May 10, 1978 584
Responses of John R. Bolton, Assistant Attorney General, U.S. Department of Justice, to questions submitted by the Senator 832
Weaver, Robert C.:
Testimony 381
Prepared statement 384
Wilcox, Mary Rose:
Testimony 247
Prepared statement 253
Exhibits from the city of Phoenix, Equal Opportunity Department:
Brochure: "Knock Out Discrimination" 256
Abstract: Housing Discrimination in Phoenix: 1986 260
Wilson, Michael:
Testimony 376
Prepared statement 378
Wolf, Arthur D.:
Testimony 585
Prepared statement with appendix 588
Responses to Senator's questions 721, 755
Yzaguirre, Raul:
Testimony 76
Prepared statement 78

APPENDIX

Additional Material for the Record

Statements of:
American Association of University Women, Washington, DC 845
American Civil Liberties Union, Chicago, IL 846
Anti-Defamation League of B'nai B'rith, New York, NY 847
American Planning Association, Washington, DC 850

Page

Statements of—Continued
Association for Retarded Citizens of the United States, Arlington, TX 875
Badain, David I., New York, NY 876
Child Welfare League of America, Inc., Washington, DC 958
Children's Defense Fund, Washington, DC 965
Consortium for Citizens With Developmental Disabilities 970
Child Welfare League of America, Inc., Washington, DC 972
Housing Opportunities Made Equal, Richmond, VA 974
International Union, United Automobile & Agricultural Implement Workers of America—UAW, Washington, DC 978
Nageotte, Richard R., Woodbridge, VA 979
National Association of Independent Insurers, Washington, DC 980
National Council on the Handicapped, Washington, DC 985
National League of Cities, Washington, DC 988
New York City Commission on Human Rights, New York, NY 996
Paralyzed Veterans of America, Washington, DC 1000
Polikoff, Alexander, Chicago, IL 1012
Simpson, William, jointly with Juanita H. Simpson, Peter L. Flemister 1016
Southern Poverty Law Center, Montgomery, AL 1030
United Cerebral Palsy Associations, Washington, DC 1061
United States Catholic Conference, Washington, DC 1062
Washington Post advertisement, April 22, 1987 1064

FAIR HOUSING AMENDMENTS ACT OF 1987

TUESDAY, MARCH 31, 1987

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Paul Simon (chairman of the subcommittee) presiding.

Also present: Senators Specter, Kennedy, and Hatch.

Staff present: Deborah Leavy, chief counsel; Jeffrey Robinson, minority chief counsel; Cheryl G. Matcho, chief clerk; Margaret Morton, legislative fellow.

OPENING STATEMENT OF SENATOR PAUL SIMON

Senator SIMON. The subcommittee will come to order.

This is the first hearing of the Subcommittee on the Constitution. Let me first acknowledge the good work done by Senator Hatch these last few years in leading this subcommittee, and we are also very pleased to have Senator Specter now as the ranking member on the subcommittee.

We have a good group of witnesses for this first hearing on fair housing legislation. The Senate's last hearings on the issue of fair housing occurred in 1979. The Judiciary Committee's findings eight years ago are as true today as they were then. No enforcement provisions exist in current law to combat continuing housing discrimination, and it is real.

The most recent survey by HUD, that the Secretary may be talking about shortly, shows that 48 percent of blacks looking to buy a home encounter discrimination; 72 percent of blacks hoping to rent encounter discrimination.

There are statistics from Texas that are even more staggering for Hispanics. People with handicaps, people with children, a great variety of people in our society face problems with discrimination in housing.

The Department has no enforcement power. HUD's authority extends only to mediation between the two parties. HUD is not empowered to issue cease and desist orders. Because of this lack of enforcement authority, few victims of discrimination actually see their complaints redressed.

The bill before this subcommittee would permit redress through the administrative law judge system. An individual complaint would be investigated by HUD to determine reasonable cause and HUD would first attempt reconciliation. If mediation fails, within

100 days HUD would file a complaint with an administrative law judge and appear on behalf of the victim.

If the administrative law judge finds in favor of the plaintiff, the victim may move into the unit in question and recover expenses and damages, if appropriate. The administrative law judge may also issue a cease and desist order. Violation of the order would be punishable by fines of up to $1,000 a day.

Part of the American dream is still to have a house. That dream is threatened today by two things. One is the economic inability of a great many people to buy or rent that home that they want, and the second barrier for a great many people is discrimination. This Congress ought to address both of those barriers. Only one of those barriers is under the jurisdiction of this subcommittee and I hope we move expeditiously on that problem.

Senator Specter.

OPENING STATEMENT OF SENATOR ARLEN SPECTER

Senator SPECTER. Thank you very much, Mr. Chairman. I am pleased to join with you and other members of this subcommittee on the consideration of the very important issue of discrimination in housing and a consideration of Senate bill 558, which I have cosponsored with Senator Kennedy and other members of this committee.

I think it is entirely appropriate at this time that the Congress take a good look at the critical issue of discrimination in housing in line with the very important Federal role in housing generally.

It was after World War II that Federal legislation was initiated to provide adequate housing. I recall serving as district attorney for the city of Philadelphia and being concerned about the role of housing in a big city as the Federal rules impacted. I recall investigations into corruption in housing; they always seemed to focus on minority housing.

Housing, along with job opportunities and education, are realistically the triad for defining the quality of life and for defining opportunity. The issue of discrimination in housing should have been addressed years ago, but I am glad we are taking it up at this time, and I believe that the 100th Congress is the time when we can get some action on this important subject.

The chairman has already outlined some of the statistics, but I think they are worth repeating, where blacks face more than a 40-percent chance of encountering discrimination when they are seeking to buy. Blacks encounter more than a 70-percent likelihood of discrimination when they are seeking to rent; great problems with those who are handicapped making even minor modifications to the housing that they seek to rent in order to make it livable.

Families with children find rental housing so unavailable that some parents have been forced to place their children in foster care because they could not find a place for them to live.

The legislation which we are considering, and there may be some variations offered, will move for tough enforcement. Standards for housing are meaningless unless there is a remedy and a really strong and tough enforcement policy.

The Department of Housing and Urban Development has a major role to play in this area, and I have had a number of meetings with the distinguished Secretary of Housing and Urban Development, the Honorable Samuel Pierce, about that role.

I am hopeful that we will fashion legislation which will have a role for administrative law judges and for enforcement by the Department of Housing and Urban Development.

At this time, I would like to express my appreciation to Secretary Pierce for his responsiveness to major housing problems. On May 13, 1985 when a major problem confronted Philadelphia in the MOVE incident, when an entire block was destroyed, some 61 houses, Secretary Pierce was in Philadelphia on Friday following the Monday of that occurrence with funding and with housing.

When we have had problems on reallocation of funds, the Secretary has been present. When we have had a major problem in the Logan section of the city, the Secretary has been present. When we have had difficulties with subsidence in Pittsburgh, the Secretary has been present.

I think his leadership has been exemplary and I look forward to his testimony and to working with his Department on some very strong enforcement policies and for the handicapped and for families with children.

I commend you, Mr. Chairman, for scheduling 4 days of hearings. That is an ambitious program, but I think that this is a subject of sufficient importance to warrant that kind of close attention.

Thank you.

Senator SIMON. We are pleased to have the chief sponsor of the legislation here, Senator Kennedy.

OPENING STATEMENT OF SENATOR EDWARD M. KENNEDY

Senator KENNEDY. Thank you very much, Mr. Chairman.

Today, we renew our efforts to make this Nation's commitment to fair housing a reality. We begin hearings on S. 558, a bill introduced by Senator Specter and myself, and cosponsored by the chairman of this subcommittee and 36 other Senators, which would remedy the shortcomings of the Fair Housing Act.

Nearly 20 years ago in the wake of Dr. Martin Luther King's assassination, Congress enacted the Fair Housing Act of 1968. Now, almost 20 years after Congress made the promise to end housing discrimination, it is clear that the promise has not been kept.

The 1968 act lacked the teeth to do its job. Housing discrimination persists in America. The Department of Housing and Urban Development estimates that nearly 2 million incidents of racial discrimination alone occur each year.

Housing discrimination isolates racial and ethnic minorities and perpetuates the ignorance that is the core of bigotry. Discrimination in housing hampers progress to achieve equality in other vital areas as well.

Residential segregation is the primary obstacle to meaningful school integration, and as businesses move away from the urban core, housing discrimination prevents its victims from following jobs to the suburbs, impeding efforts to reduce minority unemployment.

Under existing law, HUD may respond to complaints of housing discrimination only by "conference, conciliation, and persuasion," but because HUD lacks real power to enforce the law, would-be violators have little incentive to obey it.

The Kennedy-Specter bill would give HUD real enforcement authority. Where a complaint is found to have merit, HUD would initiate proceedings before an administrative law judge, who would be authorized to award compensatory and punitive damages and injunctive relief. We are confident that the administrative proceeding envisioned in the bill would be a faster, more efficient and less expensive means of resolving individual complaints than Federal court litigation.

More than 25 Federal agencies use administrative law judges in a broad variety of enforcement proceedings; 1,100 such judges now work for the Federal Government and they decide more cases every year than are decided in all the Federal district courts.

The sponsors of this bill strongly believe that its administrative enforcement approach is the most appropriate means to handle individual complaints of housing discrimination.

Under the Kennedy-Specter bill, State and local fair housing agencies would continue to play their central role in enforcing the act. The bill would continue the practice of referring individual complaints to State and local agencies certified by HUD and would give these agencies 4 years to bring their enforcement procedures in line with those required under our bill.

In addition to providing a real enforcement mechanism, the bill would prohibit discrimination in housing against the handicapped and families with children. Over 30 million Americans have a disability of some kind. They face prejudice in housing both because of the unenlightened attitudes of some towards those with disabilities and because of unwillingness to permit handicapped persons to make reasonable modifications in dwellings to meet their special needs. Our bill would prohibit this discrimination, and thus remove an unnecessary barrier to the efforts of the handicapped to lead full and normal lives.

We have become increasingly aware that families with children also face serious discrimination in housing. A HUD-funded study presented to the 1980 White House Conference on Families found that one-fourth of the rental units in the country barred families with children.

By reducing the availability of housing for families, this discrimination drives up its cost and imposes a heavy burden on those least able to afford it. Our bill would prohibit this discrimination, while protecting the legitimate interest elderly Americans have in living in bona fide retirement communities.

Over the years, those of us committed to civil rights have tried many times to strengthen the Fair Housing Act. In 1980, after extensive hearings and deliberations, we came close to passing a fair housing bill.

Our efforts since then have been stalled, but now the Senate is under new management and I hope that we can at last enact a fair housing law that will finally honor our national commitment to end housing discrimination.

I commend you, Mr. Chairman, for these hearings. I look forward to working with the other members of the committee. I thank Secretary Pierce for his presence here today, and I know that we are fortunate to have the Secretary help us on this very important piece of legislation. He is very familiar with both the subject matter and as the legislation, and I think we will benefit from his representations and presentations to our committee.

I want to thank the Chair very much for holding these hearings.

Senator SIMON. Thank you. Senator Kennedy.

Senator Hatch.

OPENING STATEMENT OF SENATOR ORRIN G. HATCH

Senator HATCH. Thank you, Senator Simon. I want to compliment you, Mr. Chairman, for your chairmanship on this very, very important subcommittee. This subcommittee, it seems to me, handles most of the very controversial issues in our society, and they are all very important issues, not the least of which is this one.

We had a major battle in the earlier part of this decade on the fair housing law and we came very close to passing a major bill at that time. It bogged down because of the battle over the intent test versus the effects test.

As of today, I think 9 of the 12 circuit courts of appeals have basically endorsed an effects test, but the resolution of that conflict has never been decided by the Supreme Court, and I suspect that it will be some time in the future.

I will be interested in reading the testimony of the witnesses and listening to the witnesses as much as I can over the totality of these hearings. I am very concerned about this bill, whether or not it is going to add more burdens to those who need housing, whether or not it is going to add more burdens to those who own housing, whether or not those burdens are justified, and whether or not it really is going to be a step forward in the ending of discrimination.

I have to say that I support the fundamental objectives of the proposed Fair Housing Act Amendments because I believe we should stamp out discrimination wherever it exists.

But on the issue of intent versus effect—I am afraid that is going to have to be decided by the Supreme Court. If it becomes an issue in this matter, it may be a monumental issue. Thus far, it has not been because the bill, as I understand it, does not really go one way or the other and the sponsors rely very much on the nine circuits that have basically upheld the position that they feel is right—the ability to prove discrimination through an effects or results test.

The only place I know where that has been fully accepted by the Supreme Court is in the Voting Rights Act, and I might be able to understand that although I fought the results test on that particular issue.

So I am interested, Mr. Chairman, in learning more about this bill, learning more from the witnesses, and seeing just whether this bill, on balance, is one that will end discrimination while at the same time encouraging more housing for people in our society who need housing.

I look forward to reading the testimony, and listening to what I can. Mr. Chairman, I compliment you on stepping forth in this

area and I hope that I can, in the end, be with you on this bill. I would like nothing better than to be able to support it in the end.

Senator SIMON. Thank you, Senator Hatch.

At this time I would like to insert in the record the statement of Senator Biden, the chairman of the full committee, who has been a strong supporter of fair housing. He also has some questions he wants to enter into the record.

Also I would like to insert my prepared statement and the statements of Senators Kennedy, Hatch, Metzenbaum, and Specter, plus the text of S. 558.

[The material referred to above follows:]

PREPARED STATEMENT OF SENATOR JOSEPH R. BIDEN, JR.

I am delighted to be here today at the first of four days of hearings on the Fair Housing Amendments Act of 1987. I know it is the intention of Chairman Simon to hold comprehensive and fair hearings before expeditiously moving this vital piece of legislation.

My colleagues on the Judiciary Committee, as well as others, have heard me state previously that strengthening enforcement of the fair housing law is one of my top legislative priorities.

As I am sure we will hear today, there is ample evidence of continuing discrimination against minorities, families and handicapped individuals seeking to find a place to live. Studies conducted for the Department of Housing and Urban Development show that nearly half the black homeowners in this country will be discriminated against, and that nearly three-quarters of the blacks who seek to rent will be turned away.

But we should not look merely at the statistics. Behind these disturbing numbers are thousands of individual Americans, who have been denied the very basic right of finding a place to live. During the course of these hearings we will hear from some of these people.

We'll hear from a black woman whose house was firebombed; from another woman who faced eviction from one of the dwindling number of affordable and decent apartments for families in the Washington, D.C. area, because the owner wanted to convert the building to a "singles only policy." She learned the hard way that the existing HUD conciliation process is largely ineffective.

And we will hear of the plight of a handicapped individual who was not allowed to make a minor modification in her bedroom in order to be able to utilize her apartment unit.

Had an effective and inexpensive enforcement remedy been in place, these individuals might have been spared their ordeal. That is what this legislation is all about—finding an efficient and effective way of helping these individuals—and every other American—find a home.

QUESTIONS FROM SENATOR BIDEN

To Secretary Pierce:

Question 1. As you know, S. 558 establishes an administrative hearing process. All the parties involved—victims, landlords and owners—would know that the Administrative Law Judges stood ready to make an expeditious decision in a housing discrimination case. Don't you think the ALJ process would provide an incentive for the parties to settle, especially compared to the existing conciliation process?

Question 2. With respect to the proposal to have the Justice Department bring individual housing cases—as opposed to pattern and practice authority—I have grave doubts that the Justice Department would have the necessary resources to effectively discharge this responsibility.

How many Justice lawyers do you think it will take to handle these individual complaints?

Would Justice need to ask for more lawyers? Are you prepared to publicly support a request for more attorneys?

Question 3. When Assistant Attorney General Reynolds testified before the Judiciary Committee recently I asked him if the Justice Department was prepared to ask for more resources to handle the new authority it wants to bring in individual housing discrimination cases. He essentially said that the Division has not addressed the

budget implications of its proposal. Mr. Secretary, how could we think about solving this problem by giving more litigation authority to the Justice Department if the Department has made no commitment, nor even thought about, the additional resources it would need to carry out the new responsibility?

Question 4. Mr. Reynolds recently testified that the Administration would be willing to look at the ALJ approach included in S. 558, which is being considered. I applaud that willingness to talk because I believe the consensus is that the ALJ approach is the most efficient and least costly way to put some teeth in the fair housing law. Do you share Mr. Reynolds' willingness to talk to Congress about the ALJ approach which many of my colleagues also believe is the most expeditious way to bring relief to victims of housing discrimination?

THE GENERAL COUNSEL OF HOUSING AND URBAN DEVELOPMENT,
Washington, DC, June 9, 1987.

Senator JOSEPH R. BIDEN,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR SENATOR BIDEN: Secretary Pierce has asked me to respond to your questions regarding the position of the Department of Housing and Urban Development on specific aspects of legislative proposals for strengthening the enforcement mechanisms provided in the Federal Fair Housing Law. As suggested by Senator Simon in his May 29 letter to Secretary Samuel R. Pierce (copy enclosed) I am providing this response directly to you.

Response to Question 1.

The Department of Housing and Urban Development has long recognized that the absence of an enforcement mechanism for fair housing cases has limited the effectiveness of the Department's ability to achieve voluntary resolution of fair housing complaints through the informal method of conciliation.

As Secretary Pierce stated in his testimony on April 7 before the Subcommittee on the constitution, "The most glaring deficiency in Title VIII . . . is the inability of the Federal Government to move people toward conciliation and have the decision be binding. A speedy, effective back-up mechanism is essential."

However, the Administration has indicated its belief that as a general rule enforcement processes using Administrative Law Judges are prolonged and cumbersome, it is for that reason that the Administration has been working to submit a constructive proposal for an alternative dispute resolution mechanism using voluntary and formal arbitration procedures for consideration of the Subcommittee.

Response to Questions 2 and 3.

Prior to this year's legislative initiative the Administration in 1983 and in 1986 proposed legislative revisions to the Fair Housing Act designed to provide the Attorney General with the authority to initiate civil actions in individual cases of housing discrimination. This broadening of the Attorney General's authority for pattern and practice cases was intended to provide an enforcement mechanism in the United States district courts whenever HUD conciliation efforts failed and there was reasonable cause to believe that a discriminatory housing practice had occurred.

Because it is not possible to determine the number of new complaints which would be filed under a revised fair housing law or to speculate on the percentage of unresolved cases in which a finding of reasonable cause would be made, we can not provide you with any firm data on the number of cases which would be referred for civil action under prior legislative initiatives. In addition, since information on staff burdens for the Department of Justice is uniquely within the knowledge of that Department, we are not in a position to provide any assessment of the staff time required to initiate and prosecute a fair housing case in United States district courts.

However, the Department of Housing and Urban Development would support fully any request by the Department of Justice for staff necessary to implement enforcement provisions in the Federal Fair Housing Law.

Response to Question 4.

We understand that the Assistant Attorney General for Civil Rights testified in Authorization and Oversight Hearings before the Senate Committee on the Judiciary on is willingness to look closely at and to work with Congress in efforts to enhance enforcement of the fair housing law through the courts or through the courts or through an Administrative Law Judge process. He also indicated his intent to

evaluate the use of alternative dispute resolution mechanisms as an enforcement tool.

This Department shares the commitment of the Department of Justice to consider enforcement proposals and the willingness of that Department to work with the Congress to achieve a more effective and efficient system for resolving disputes under the Federal Fair Housing Law.

If you have any further questions on this matter please feel free to contact me.

Very sincerely yours,

J. MICHAEL DORSEY.

PREPARED STATEMENT OF SENATOR PAUL SIMON

Good morning. I am pleased to open the first hearings of the Subcommittee on the Constitution for the 100th Congress—hearings on S. 558, the Fair Housing Amendments Act of 1987. I want to welcome our distinguished witnesses, the Honorable Samuel Pierce, Secretary of the Department of Housing and Urban Development ("HUD"); Benjamin Hooks, the president of the National Association for the Advancement of Colored People; Raul Yzaguirre, the president of the National Council of La Raza; Irene Natividad, the president of the National Women's Political Caucus; Marca Bristo, the president of the National Center on Independent Living; Bishop James Malone, representing the U.S. Catholic Conference; Robert Butters of the National Association of Realtors; and Professor Rodney Smolla of the University of Arkansas.

The bill before this committee amends the Federal Fair Housing Law, title VIII of the Civil Rights Act of 1968. It is sponsored by a bipartisan group of 38 senators: Senators Kennedy, Specter, Biden, Weicker, Simon, Chafee, Moynihan, Durenberger, Adams, Bentsen, Bingaman, Bradley, Burdick, Cranston, Dixon, Dodd, Fowler, Glenn, Gore, Harkin, Hatfield, Inouye, Kerry, Lautenberg, Leahy, Levin, Matsunaga, Metzenbaum, Mikulski, Mitchell, Packwood, Proxmire, Pryor, Riegle, Sarbanes, Stafford, Wirth, and Rockefeller.

The Senate's last hearings on the issue of fair housing occurred in 1979. The Judiciary Committee's findings eight years ago are as true today as they were then—no enforcement provisions exist in current law to combat continuing housing discrimination. As a result, the law that was supposed to wipe out housing discrimination from our country is not working.

Recent studies have shown unacceptable rates of discrimination against blacks, Hispanic Americans, disabled people, families with children, women and Asian Americans. The most recent HUD sponsored study found that blacks looking to buy a home have a 48 percent chance of encountering discrimination; their chances in the rental market are 72 percent. Another study in Dallas found that dark-skinned Hispanic Americans were likely to be discriminated against in 96 cases out of 100 when looking for housing. Disabled people are also locked out of many housing opportunities. A 1980 HUD survey noted that 26 percent of our nation's rental housing market bans rental to families with children; another 50 percent sets limits on ages and numbers of children allowed.

The Fair Housing Act of 1968 was a landmark piece of legislation for its time, but it did not go far enough. While the 1968 law enables a victim of discrimination to report the incident to HUD, the Department has no enforcement power. HUD's authority extends only to mediation between the two parties; HUD is not empowered to issue "cease and desist" orders.

Because of this lack of enforcement power, few victims of discrimination actually see their complaints redressed. Carla Hills, a former HUD Secretary under President Ford, explained that those who break the law "know all too well that HUD has no meaningful enforcement power. Many have virtually ignored our conciliation efforts because they have no inducement to cooperate. In effect, the present law, in relying on conciliation, is an invitation to intransigence." Congress cannot allow this charade to continue.

The bill before this subcommittee would permit redress through Administrative Law Judges. The ALJ process is faster, simpler, and less costly. Over 28 Federal departments use the ALJ system. An individual complaint would be investigated by HUD to determine reasonable cause and HUD would first attempt conciliation. If mediation fails, within 100 days HUD would file a complaint with an ALJ and appear on behalf of the victim.

If the ALJ finds in favor of the plaintiff, the victim may move into the unit in question and recover expenses and damages, if appropriate. The ALJ may also issue a "cease and desist" order. Violation of the order would be punishable by fines of up to $1,000 per day.

The bill also includes two new categories of people who are protected from housing discrimination—the disabled, and families with children. These two groups have seen a marked and alarming increase in discrimination. The bill allows those with disabilities, both mental and physical, to reasonably modify a housing unit at their expense. The bill also prohibits discrimination based upon the existence or number of children for an appropriately sized unit. Families with children may be excluded from retirement communities and other seniors' housing.

I am pleased to support this bill. It puts teeth into the existing law and broadens the protective powers to include additional victims of discrimination. The United States must be a land of opportunity for all—not just those with a certain color skin, or without children, of a certain sex, or without physical or mental challenges. I look forward to listening to the witnesses' testimony.

PREPARED STATEMENT OF SENATOR EDWARD M. KENNEDY

Today we renew our efforts to make this Nation's commitment to fair housing a reality. We begin hearings on S. 558, a bill introduced by Senator Specter and myself—joined by 37 other Senators including the distinguished chairman of this subcommittee—which would remedy the shortcomings of the Fair Housing Act.

Nearly 20 years ago, in the wake of Dr. Martin Luther King's assassination, Congress enacted the Fair Housing Act of 1968.

Now, almost 20 years after Congress made the promise to end housing discrimination, it is clear that the promise has not been kept. The 1968 act lacked the teeth to do its job. Housing discrimination persists in America; the Department of Housing and Urban Development estimates that nearly 2 million incidents of racial discrimination alone occur each year.

Housing discrimination isolates racial and ethnic minorities and perpetuates the ignorance that is the core of bigotry. And discrimination in housing hampers progress to achieve equality in other vital areas as well.

Residential segregation is the primary obstacle to meaningful school integration. And as businesses move away from the urban core, housing discrimination prevents its victims from following jobs to the suburbs, impeding efforts to reduce minority unemployment.

Under existing law, HUD may respond to complaints of housing discrimination only by "conference, conciliation and persuasion." But because HUD lacks real power to enforce the law, would-be violators have little incentive to obey it.

The Kennedy-Specter bill would give HUD real enforcement authority. Where a complaint is found to have merit, HUD would initiate proceedings before an administrative law judge, who would be authorized to award compensatory and punitive damages and injunctive relief. We are confident that the administrative proceeding envisioned in the bill would be a faster, more efficient, and less expensive means of resolving individual complaints than Federal court litigation.

More than 25 Federal agencies use administrative law judges in a broad variety of enforcement proceedings; 1,100 such judges now work for the Federal Government, and they decide more cases every year than are decided in all the Federal district courts. The sponsors of this bill strongly believe that its administrative enforcement approach is the most appropriate means to handle individual complaints of housing discrimination.

Under the Kennedy-Specter bill, State and local fair housing agencies would continue to play their central role in enforcing the act. The bill would continue the practice of referring individual complaints to State and local agencies certified by HUD, and would give these agencies 4 years to bring their enforcement procedures in line with those required under our bill.

In addition to providing a real enforcement mechanism, the bill would prohibit discrimination in housing against the handicapped and families with children.

Over 30 million Americans have a disability of some kind. They face prejudice in housing, both because of the unenlightened attitude of some toward those with disabilities, and because of unwillingness to permit handicapped persons to make reasonable modifications in dwellings to meet their special needs. Our bill would prohibit this discrimination, and thus remove an unnecessary barrier to the efforts of the handicapped to lead full and normal lives.

We have become increasingly aware that families with children also face serious discrimination in housing. A HUD-funded study presented to the 1980 White House Conference on Families found that one fourth of the rental units in the country barred families with children. By reducing the availability of housing for families, this discrimination drives up its cost and imposes a heavy burden on those least

able to afford it. Our bill would prohibit this discrimination, while protecting the legitimate interest elderly Americans have in living in bona fide retirement communities.

Over the years, those of us committed to civil rights have tried many times to strengthen the Fair Housing Act. In 1980, after extensive hearings and deliberations, we came close to passing a fair housing bill. Our efforts since then have been stalled. But now the Senate is under new management, and I hope that we can at last enact a fair housing law that will finally honor our national commitment to end housing discrimination.

Mr. Chairman, I commend you for holding these hearings, and I look forward to working with the Committee and, I hope, Secretary Pierce and the Administration, to make the ideal of fair housing a reality.

PREPARED STATEMENT OF SENATOR ORRIN G. HATCH

At the outset of this hearing, I would like to state my support for the fundamental objectives of the proposed Fair Housing Act Amendments. I am convinced that there are gaps in the 1986 Open Housing Act that make it difficult to fully promote its objective—equal housing opportunity for all citizens. Accordingly I have introduced S. 867 to strengthen the act's enforcement provisions. This bill provides strong back-up mechanisms to encourage parties to use the conciliation processes. This bill also includes provisions to extend title 8 to persons subject to discrimination on the basis of handicap.

In recommending these changes, I share the goals of the original author of the Open Housing Act, Senator Walter Mondale, who stated that the Act is "designed to deal exclusively with the refusal to sell or rent for racial reasons, and it does not apply to the existence of other reasons or does not apply to zoning requirements, ordinances, and the rest." (Hearings, 1967).

Section 804 of the present act states simply that it shall be unlawful, among other things, to refuse to sell or rent a house after a bona fide offer "because of" race, color, religion, sex, or national origin. According to my dictionary, "because of" means "by reason of" or "on account of." In other words, there must be a nexus or relationship between the activity and the proscribed discriminatory motivation. It is not always a violation to refuse to sell, but only to refuse to sell "because of" another's race. This language made clear that the 90th Congress meant only to outlaw acts taken with the intent to discriminate. According to Senator Brooke, a cosponsor of the 1968 Act, "a person can sell his property to anyone he chooses as long as it is by personal choice and not because of motivations of discrimination." (114 Cong. Rec. 2283 (1968)).

Of course, intent can be proven a number of ways. On occasion, there may be evidence of overt refusal to sell because of race. More likely, intent will be proven by the totality of the circumstances, including statistical evidence of the disproportionate effect of a housing action. This, however, is the critical distinction between an intent standard and an effects standard. Unlike the pure effects test, the intent test drawn from the language of the Act does not rely solely upon statistical evidence to determine a violation. Under the intent test, justice is not merely a statistical calculation.

Many land use practices of local governments and communities designed to promote health, quietude, beauty, residential character and the like could have the inadvertant effect of increasing the cost of housing—an effect which may be "disparate" given the uneven distribution of income amongst various ethnic groups. Although the Supreme Court has never decided between an intent or effects test, 9 of 12 circuits have endorsed an effects analysis. This has detracted from the Housing Act's mission of eliminating discrimination by invalidating an adults-only housing policy or an ordinance barring construction of an apartment complex in the midst of a neighborhood of single-family homes.

To use any standard other than discriminatory intent in weighing fair housing challenges would jeopardize many kinds of beneficial zoning and local ordinances. Moreover it would vest unbridled discretion in Federal courts or arbitrators or administrative law judges to restructure communities under the guize of title 8 enforcement.

In sum, I strongly desire to ensure that any individual who is denied an apartment because of skin color or a home because of ethnic background will have adequate remedies. In other words, I hope to reinvigorate equal opportunity in national housing policies without jeopardizing beneficial State and local housing policies.

PREPARED STATEMENT OF SENATOR HOWARD METZENBAUM

I have mixed feelings about this hearing.

On the one hand I am glad that we are holding hearings on a bill which is co-sponsored by 38 Senators and 72 Members of the House.

This number of co-sponsors shows that the issue of fair housing is important, that many Members of this Congress are committed to the passage of a fair housing bill this year.

On the other hand, I am distressed that the problem of fair housing is still serious almost twenty years after the passage of the Fair Housing Act.

I am distressed that there are people in this Congress who will oppose this fair housing bill, who will oppose strengthening of the Fair Housing Act.

I am distressed that our society has not matured to the point where people are able to satisfy a basic need—housing—without encountering discrimination.

The Fair Housing Act must be strengthened.

Discrimination in housing is still a major problem in America. A recent HUD study estimated that at least 2 million incidents of housing discrimination occur each year.

Over 100 years after emancipation, blacks looking for housing have up to a 70 percent chance of encountering discrimination.

Housing discrimination also greets other groups looking for a decent place to live: Mexican Americans, women, and Asian Americans, families with children, and handicapped persons.

This bill will strengthen the fair housing law by providing a quick and effective administrative remedy for victims of housing discrimination; by making discrimination against handicapped illegal; by protecting families with children from housing discrimination.

This bill is one of the most important pieces of civil rights legislation we will consider this year.

Let's not lose sight of the fact that in 1968 we made a promise to eliminate housing discrimination.

We made the promise, we passed important legislation, but we didn't go far enough.

We didn't provide all the tools necessary to accomplish our goal, and we didn't provide protection to all groups who need safe and decent housing.

This year we can improve the act. This year we can do something meaningful to make the promise of fair housing a reality.

This is the bicentennial year, and we all talk about our dedication to equal rights and equal opportunity.

This talk is useful. But we must do much more.

How can millions of Americans celebrate our Constitution with enthusiasm if they are turned away from shelter because of the color of their skin.

How can millions of Americans celebrate our Constitution if they are turned away from shelter because they are women?

How can millions of Americans celebrate our Constitution if they are turned away from housing because they have a child.

We must demonstrate our commitment to equality, our commitment to fair housing, by making this bill a law.

If we do not, our commitment to equality will remain an empty promise to millions of Americans.

Thank you Mr. Chairman.

PREPARED STATEMENT OF SENATOR ARLEN SPECTER

Mr. Chairman, before we begin today's hearing, the first of 4 days of hearings, on the Fair Housing Act Amendments of 1987, I want to publicly congratulate you on your chairmanship of this pivotal subcommittee—the subcommittee entrusted with the stewardship of our Constitution as we celebrate its 200th anniversary. As ranking Republican on the subcommittee, I am looking forward to working with you during the 100th Congress.

I am pleased that the first hearings of this subcommittee are on fair housing. I believe that passage of strong legislation, legislation that will ensure that the promise of fair housing for all Americans made in the 1968 Civil Rights Act is not an empty promise, is the most important civil rights measure this committee will consider during the next 2 years. It is therefore fitting that consideration of this legislation is the first item on our agenda.

Mr. Chairman, in addition to being pleased that fair housing legislation is the first item on our agenda, I am also pleased that you have chosen to hold 4 days of hearings on this measure. I applaud that decision not because hearings are necessary to convince this Senator that there is a problem—there can be no doubt of that fact—nor because I feel the need for hearings to assist in drafting an appropriate solution to that problem—as introduced, S. 558 is a balanced and effective solution. Rather, I applaud the decision to hold 4 days of hearings because I am convinced that when the complete story is told, when we have heard from all who wish to speak, the American people will share my belief that the current situation is intolerable and that S. 558 is the best solution.

The next 4 days of hearings will make the facts known to the American people, and those facts are intolerable. It is intolerable that a black person in this country when searching for housing, faces a greater than 70 percent chance of encountering discrimination when attempting to rent and a greater than 40 percent of encountering discrimination when seeking to buy. It is intolerable that, when income differentials are taken into account, blacks and Hispanics are twice as likely as whites to live in inadequate and overcrowded housing. It is intolerable that citizens with disabilities are denied the right to pay for the minor modifications necessary to allow them full access to housing—access that is crucial to the conduct of a normal life. It is intolerable that families with children find rental housing so unavailable that some parents have been forced to place their children in foster care because they could not find a place for them to live.

This intolerable situation exists in this country, in part, because there is no Federal protection in this area for the handicapped, because there is no protection for families with children, and because those protections that do exist are rendered meaningless because they are virtually unenforceable.

The legislation we are considering during the next 4 days will cure these defects. Housing discrimination against the handicapped will be outlawed. Housing discrimination against families with children will be outlawed. And most important, the guarantees of non-discrimination will be backed up with an effective and efficient remedy. A remedy that will encourage the previously silent victims of housing discrimination to assert their rights. A remedy that will put the practitioners of discrimination on notice that fair housing is simply the stated policy of our Nation, it is the enforced command of the law.

I look forward to participating in these hearings, and to hearing from the many witnesses who will share with us their knowledge, their insights, and their personal experiences. I trust that at the conclusion of these hearings the case for amendments to the Fair Housing Act will have been made, and we in the Congress, working with the administration and any other concerned persons, will be ready to pass legislation. It's time to make the policy of fair housing announced in 1968, a reality in 1987.

II

100TH CONGRESS
1ST SESSION

S. 558

To amend title VIII of the Act commonly called the Civil Rights Act of 1968, to revise the procedures for the enforcement of fair housing, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 19, 1987

Mr. KENNEDY (for himself, Mr. SPECTER, Mr. BIDEN, Mr. WEICKER, Mr. SIMON, Mr. CHAFEE, Mr. MOYNIHAN, Mr. DURENBERGER, Mr. ADAMS, Mr. BENTSEN, Mr. BINGAMAN, Mr. BRADLEY, Mr. BURDICK, Mr. CRANSTON, Mr. DIXON, Mr. DODD, Mr. FOWLER, Mr. GLENN, Mr. GORE, Mr. HARKIN, Mr. HATFIELD, Mr. INOUYE, Mr. KERRY, Mr. LAUTENBERG, Mr. LEAHY, Mr. LEVIN, Mr. MATSUNAGA, Mr. METZENBAUM, Ms. MIKULSKI, Mr. MITCHELL, Mr. PACKWOOD, Mr. PROXMIRE, Mr. PRYOR, Mr. RIEGLE, Mr. SARBANES, Mr. STAFFORD, Mr. WIRTH, and Mr. ROCKEFELLER) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend title VIII of the Act commonly called the Civil Rights Act of 1968, to revise the procedures for the enforcement of fair housing, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Fair Housing Amendments Act of 1987".

SEC. 2. SHORT TITLE FOR 1968 ACT.

The Act entitled "An Act to prescribe penalties for certain acts of violence or intimidation, and for other purposes" (Public Law 90–284, approved April 11, 1968) is amended by inserting after the comma at the end of the enacting clause the following: "That this Act may be cited as the 'Civil Rights Act of 1968'.".

SEC. 3. REFERENCES TO 1968 ACT.

Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or provision, the reference shall be considered to be made to a section or other provision of the Act entitled "An Act to prescribe penalties for certain acts of violence or intimidation, and for other purposes" (Public Law 90–284, approved April 11, 1968).

SEC. 4. SHORT TITLE FOR TITLE VIII.

Title VIII is amended by inserting after the title's heading the following new section:

"SHORT TITLE

"SEC. 800. This title may be referred to as the 'Fair Housing Act'.".

SEC. 5. AMENDMENTS TO DEFINITIONS SECTION.

(a) MODIFICATION OF DEFINITION OF DISCRIMINATORY HOUSING PRACTICE.—Section 802(f) is amended by striking out "or 806" and inserting "806, or 817" in lieu thereof.

(b) ADDITIONAL DEFINITIONS.—Section 802 is amended by adding at the end the following:

"(h) 'Handicap' means, with respect to a person—

"(1) a physical or mental impairment which substantially limits one or more of such person's major life activities,

"(2) a record of having such an impairment, or

"(3) being regarded as having such an impairment.

"(i) 'Aggrieved person' includes any person who—

"(1) claims to have been injured by a discriminatory housing practice; or

"(2) believes that such person will be injured by a discriminatory housing practice that is about to occur.

"(j) 'Complainant' means the person (including the Secretary) who files a complaint under section 810.

"(k) 'Familial status' means one or more individuals' (who have not attained the age of eighteen years) being domiciled with—

"(1) a parent or another person having legal custody of such individual or individuals; or

"(2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

"(l) 'Conciliation' means the attempted resolution of issues raised by a complaint, or by the investigation of such complaint, through informal negotiations involving the aggrieved person, the respondent, and the Secretary.

"(m) 'Conciliation agreement' means a written agreement setting forth the resolution of the issues in conciliation.

"(n) 'Respondent' means—

"(1) the person or other entity accused in a complaint of an unfair housing practice; and

"(2) any other person or entity identified in the course of investigation and notified as required with respect to respondents so identified under section 810(a).".

SEC. 6. DISCRIMINATORY HOUSING PRACTICE AMENDMENTS.

(a) ADDITIONAL DISCRIMINATORY HOUSING PRACTICES.—Section 804 is amended by adding at the end thereof the following:

"(f)(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of—

"(A) that buyer or renter,

"(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

"(C) any person associated with that buyer or renter.

"(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of—

"(A) that person; or

"(B) a person who resides or is expected to reside in such dwelling; or

"(C) any person associated with the person discriminated against.

"(3) For purposes of this subsection, discrimination includes a refusal—

"(A) to permit, at the expense of the handicapped person, reasonable modifications of premises occupied or to be occupied, by such person if such modifications are necessary to afford such person equal access to those premises; or

"(B) to make reasonable accommodations in rules, policies, practices, or services, when such accommodations are necessary to afford such person equal opportunity to use and enjoy a dwelling.".

(b) ADDITIONAL PROTECTED CLASSES.—(1) Section 806 and subsections (c), (d), and (e) of section 804, are each

amended by inserting "handicap, familial status," immediately after "sex," each place it appears.

(2) Subsections (a) and (b) of section 804 are each amended by inserting "familial status," after "sex," each place it appears.

(c) DISCRIMINATION IN FINANCING OF HOUSING AND INSURANCE.—Section 805 is amended to read as follows:

"DISCRIMINATION IN FINANCING OF HOUSING AND INSURANCE

"SEC. 805. (a) IN GENERAL.—It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.

"(b) DEFINITION.—As used in this section, the term 'residential real estate-related transaction' means any of the following:

"(1) The making, purchasing, or insuring of loans or providing other financial assistance—

"(A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or

"(B) secured by residential real estate.

"(2) The insuring of titles to real estate or against hazards to dwellings.

"(3) The selling, brokering, or appraising of residential real property.".

(d) ADDITIONAL EXEMPTION.—Section 807 of such Act is amended by adding at the end of such section the following: "Nothing in this title limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling unit. Nor does any provision in this title regarding familial status apply with respect to dwellings provided under any State or Federal program specifically designed and operated to assist elderly persons, as defined in the State or Federal program, or to dwellings in bona fide retirement communities designed and operated for older persons or dwellings otherwise intended and operated exclusively for older persons, and equipped with facilities and amenities specifically designed to meet the physical and social needs of such persons.".

(e) CLERICAL AMENDMENT.—The heading of section 804 is amended by adding at the end the following: "AND OTHER PROHIBITED PRACTICES".

SEC. 7. ADDITIONAL ADMINISTRATIVE AUTHORITY.

(a) COOPERATION WITH SECRETARY.—Section 808(d) is amended—

(1) by inserting "(including any Federal agency having regulatory or supervisory authority over financial institutions)" after "urban development"; and

(2) by adding at the end thereof "Each Federal or other governmental entity participating in such programs and activities shall also carry out such entity's responsibilities under such programs and activities in a manner affirmatively to further the purposes of this title.".

(b) ADDITIONAL FUNCTIONS OF SECRETARY.—(1) Section 808(e) is amended—

(A) in paragraph (2), by inserting before the semicolon at the end the following: ", including an annual report to the Congress specifying the nature and extent of progress made nationally in eliminating discriminatory housing practices and furthering the purposes of this title, obstacles remaining to achieving equal housing opportunity, and recommendations for further legislative or executive action";

(B) in paragraph (3), by inserting "financial and" before "technical";

(C) by inserting after paragraph (3) the following new paragraph:

"(4) provide advice and assistance, consistent with the purposes of this title, to any person of lower income (as defined by the Secretary under the United States Housing Act of 1937), upon request, concerning housing assistance for which such person is eligible and

the availability and location of housing within such person's means (and the Secretary shall select the most effective means for providing these services, including the establishment of additional offices in appropriate locations and the provision of financial and technical assistance to private and public agencies to provide these services in whole or in part);";

(D) by redesignating paragraphs (4) and (5) as paragraphs (5) and (6), respectively;

(E) by striking out "; and" at the end of paragraph (5) as so redesignated;

(F) by striking out the period at the end of paragraph (6) as so redesignated and inserting "; and" in lieu thereof; and

(G) by adding at the end the following:

"(7) annually report to Congress, and make available to the public, data on the race, color, religion, sex, national origin, age, handicap, and family characteristics of persons and households who are applicants for, participants in, or beneficiaries or potential beneficiaries of, programs administered by the Department to the extent such characteristics are within the coverage of the provisions of law and Executive orders referred to in subsection (e)(2) which apply to such programs (and in order to develop the data to be included and

made available to the public under this subsection, the Secretary shall, without regard to any other provision of law, collect such information relating to those characteristics as the Secretary determines to be necessary or appropriate).".

(2) Section 808 is amended by adding at the end the following:

"(f) The provisions of law and Executive orders to which subsection (e)(7) applies are—

"(1) title VI of the Civil Rights Act of 1964;

"(2) title VIII of the Civil Rights Act of 1968;

"(3) section 504 of the Rehabilitation Act of 1973;

"(4) the Age Discrimination Act of 1975;

"(5) the Equal Credit Opportunity Act;

"(6) section 1978 of the Revised Statutes (42 U.S.C. 1982);

"(7) section 8(a) of the Small Business Act;

"(8) section 527 of the National Housing Act;

"(9) section 109 of the Housing and Community Development Act of 1974;

"(10) section 3 of the Housing and Urban Development Act of 1968;

"(11) Executive Orders 11063, 11246, 11625, 12250, 12259, and 12432; and

"(12) any other provision of law which the Secretary specifies by publication in the Federal Register for the purpose of this subsection.".

SEC. 8. ENFORCEMENT CHANGES.

Title VIII is amended by striking out section 810 and all that follows through section 815 and inserting in lieu thereof the following:

"ADMINISTRATIVE ENFORCEMENT; PRELIMINARY MATTERS

"SEC. 810. (a) COMPLAINTS AND ANSWERS.—(1)(A)(i) An aggrieved person may, not later than one year after an alleged discriminatory housing practice occurred or terminated, file a complaint with the Secretary alleging such discriminatory housing practice. The Secretary, on the Secretary's own initiative, may also file such a complaint.

"(ii) Such complaints shall be in writing and shall contain such information and be in such form as the Secretary requires.

"(iii) The Secretary may also investigate housing practices to determine whether a complaint should be brought under this section.

"(B) Upon the filing of such a complaint—

"(i) the Secretary shall serve notice upon the aggrieved person acknowledging such filing and advising the aggrieved person of the time limits and choice of forums provided under this title;

"(ii) the Secretary shall, not later than ten days after such filing or the identification of an additional respondent under paragraph (3), serve a notice, accompanied by a copy of the original complaint, of the alleged discriminatory housing practice on the respondent and advising such respondent of the procedural rights and obligations of respondents under this title;

"(iii) each respondent may file, not later than ten days after receipt of notice from the Secretary, an answer to such complaint; and

"(iv) the Secretary shall make an investigation of the alleged discriminatory housing practice, and complete such investigation promptly after the filing of such complaint.

"(C) Complaints and answers shall be under oath or affirmation, and may be reasonably and fairly amended at any time.

"(2)(A) A person who is not named as a respondent in a complaint, but who is identified as a respondent in the course of investigation, may be joined as an additional or substitute respondent upon written notice under paragraph (1) to such person from the Secretary.

"(B) Such notice, in addition to meeting the requirements of paragraph (1), shall explain the basis for the Secre-

tary's belief that the person to whom the notice is addressed is properly joined as a respondent.

"(b) INVESTIGATIVE REPORT AND CONCILIATION.—(1) During the period beginning with the filing of such complaint and ending with the filing of a charge or a dismissal by the Secretary, the Secretary shall, to the extent feasible, engage in conciliation with respect to such complaint.

"(2) Whenever, before the end of conciliation efforts by the Secretary, a civil action commenced under section 813 or 814 comes to trial, the Secretary shall immediately terminate all such efforts.

"(3) A conciliation agreement arising out of such conciliation shall be an agreement between the respondent and the aggrieved person, and shall be approved by the Secretary.

"(4) A conciliation agreement may provide for binding arbitration of the dispute arising from the complaint. Any such arbitration that results from a conciliation agreement may award appropriate specific relief, including monetary relief, to the person aggrieved.

"(5) Each conciliation agreement shall be made public.

"(6)(A) With respect to each investigation under this section, the Secretary shall prepare a final investigative report containing—

"(i) the names and dates of contacts with witnesses;

78-076 O - 88 - 2

"(ii) a summary and the dates of correspondence and other contacts with the aggrieved person and the respondent;

"(iii) a summary description of other pertinent records;

"(iv) a summary of witness statements; and

"(v) answers to interrogatories.

"(B) A final report under this paragraph may be amended if additional evidence is later discovered.

"(7) The Secretary shall, with respect to any respondent who enters into more than one conciliation agreement within any five-year period, transmit each conciliation agreement and each final investigative report to the Attorney General and to appropriate governmental licensing and supervisory authorities.

"(c) FAILURE TO COMPLY WITH CONCILIATION AGREEMENT.—Whenever the Secretary has reasonable cause to believe that a respondent has failed to comply with a conciliation agreement, the Secretary shall refer the matter to the Attorney General with a recommendation that a civil action be filed under section 814 for the enforcement of such agreement.

"(d) PROHIBITIONS AND REQUIREMENTS WITH RESPECT TO DISCLOSURE OF INFORMATION.—(1) No individually identifiable information derived from an investigation

under this title may be made public other than in the course of proceedings under this title.

"(2) Nothing said or done in the course of conciliation under this title may be made public or used as evidence in a subsequent proceeding under this title without the written consent of the persons concerned.

"(3) Whoever makes public any information in violation of this subsection shall be fined not more than $25,000 or imprisoned not more than six months, or both.

"(4) Information derived from an investigation, shall be made available to the aggrieved person and the respondent at any time upon request, as shall any final investigative report relating to that investigation.

"(e) REFERRAL FOR PROMPT JUDICIAL ACTION.—If the Secretary concludes, during an investigation of a complaint, that prompt judicial action is necessary to carry out the purposes of this title, the Secretary shall refer the matter to the Attorney General, with a request that a civil action be commenced under section 814(b).

"(f) REFERRAL FOR STATE OR LOCAL PROCEEDINGS.—(1) Whenever a complaint alleges a discriminatory housing practice—

"(A) within the jurisdiction of a State or local public agency; and

"(B) as to which such agency has been certified by the Secretary under this subsection;

the Secretary shall refer such charge to that certified agency before taking any action with respect to such charge.

"(2) Except with the consent of such certified agency, the Secretary, after that referral is made, shall take no further action with respect to such charge unless—

"(A) the certified agency has failed to commence proceedings with respect to the charge before the end of the thirtieth day after the date of such referral;

"(B) the certified agency, having so commenced such proceedings, fails to carry forward such proceedings with reasonable promptness; or

"(C) the Secretary determines that the certified agency no longer qualifies for certification under this subsection with respect to the relevant jurisdiction.

"(3)(A) The Secretary may certify an agency under this subsection only if the Secretary determines that—

"(i) the substantive rights protected by such agency in the jurisdiction with respect to which certification is to be made;

"(ii) the procedures followed by such agency;

"(iii) the remedies available to such agency; and

"(iv) the availability of judicial review of such agency's action;

are substantially equivalent to those created by and under this title.

"(B) Before making such certification, the Secretary shall take into account the current practices and past performance, if any, of such agency.

"(4) During the period which begins on the date of the enactment of the Fair Housing Amendments Act of 1987 and ends four years after such date, each agency certified for the purposes of this title on the day before such date shall for the purposes of this subsection be considered certified under this subsection with respect to those matters for which such agency was certified on that date.

"(5) Not less frequently than every five years, the Secretary shall determine whether each agency certified under this subsection continues to qualify for certification. The Secretary shall take appropriate action with respect to any agency not so qualifying.

"(g) REASONABLE CAUSE DETERMINATION AND EFFECT.—(1) If the Secretary—

"(A)(i) has not approved a conciliation agreement before the end of the one hundredth day after the date of the filing of the complaint; or

"(ii) certifies before the end of such period that conciliation of the complaint has been engaged in, and

that additional conciliation efforts are unlikely to be successful; and

"(B) determines, after an investigation under this section but not later than the end of the one hundredth day after the filing of the complaint, that reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur;

the Secretary shall take action under paragraph (2).

"(2)(A) If the Secretary is required to take action under this paragraph, the Secretary shall, except as provided in subparagraph (C), immediately issue a charge, on behalf of the aggrieved person filing the complaint, for further proceedings under section 812.

"(B) Such charge—

"(i) shall consist of a short and plain statement of the facts upon which the Secretary has found reasonable cause to believe that a discriminatory housing practice has occurred or is about to occur;

"(ii) shall be based on the final investigative report; and

"(iii) need not be limited to the facts or grounds alleged in the complaint filed under section 810(a).

"(C) If the Secretary determines that the matter involves the legality of any State or local zoning or other land use law or ordinance, the Secretary shall immediately refer

the matter to the Attorney General for appropriate action under section 814, instead of issuing such charge.

"(3) Unless the Secretary is required to take action under paragraph (2), the Secretary shall promptly dismiss the complaint. The Secretary shall make public disclosure of each such dismissal.

"(4) The Secretary shall not issue a charge under this section regarding an alleged discriminatory housing practice after the beginning of the trial of a civil action commenced by the aggrieved party under an Act of Congress or a State law, seeking relief with respect to that discriminatory housing practice.

"SUBPOENAS; GIVING OF EVIDENCE

"SEC. 811. (a) IN GENERAL.—(1) The Secretary may, in accordance with this subsection, issue subpoenas and order answers to interrogatories in aid of investigations under this title.

"(2) An administrative law judge may, in accordance with this subsection, issue subpoenas and order answers to interrogatories in aid of hearings under this section.

"(3) Such subpoenas and interrogatories may be issued to the same extent and subject to the same limitations as would apply if the subpoenas or interrogatories were issued or served in aid of a civil action in the United States district court for the district in which the investigation is taking place.

"(4) The Secretary and administrative law judges may administer oaths and affirmations for the purpose of this title.

"(b) SUBPOENAS FOR COMPLAINANTS AND RESPONDENTS.—Upon written application to the Secretary or an administrative law judge in a proceeding before the official to whom such application is made, a complainant or a respondent shall be entitled to the issuance of a reasonable number of subpoenas under subsection (a).

"(c) CRIMINAL PENALTIES.—(1) Any person who willfully fails or neglects to attend and testify or to answer any lawful inquiry or to produce records, documents, or other evidence, if it is in such person's power to do so, in obedience to the subpoena or other lawful order under subsection (a), shall be fined not more than $100,000 or imprisoned not more than one year, or both.

"(2) Any person who, with intent thereby to mislead another person in any proceeding under this title—

"(A) makes or causes to be made any false entry or statement of fact in any report, account, record, or other document produced pursuant to subpoena or other lawful order under subsection (a);

"(B) willfully neglects or fails to make or to cause to be made full, true, and correct entries in such reports, accounts, records, or other documents; or

"(C) willfully mutilates, alters, or by any other means falsifies any documentary evidence;

shall be fined not more than $100,000 or imprisoned not more than one year, or both.

"(d) WITNESS FEES.—Witnesses summoned by a subpoena under this title shall be entitled to the same witness and mileage fees as witnesses in proceedings in United States district courts.

"ADMINISTRATIVE ENFORCEMENT; HEARING PROCESS

"SEC. 812. (a) CONDUCT OF HEARING.—(1)(A) An administrative law judge appointed under section 3105 of title 5, United States Code, shall conduct a hearing on the record with respect to a charge issued under section 810 of this title.

"(B) Except to the extent inconsistent with this title, sections 554, 555, 556, and 557 of title 5, United States Code, apply to such hearing.

"(2) An individual who, as an employer or other representative of the Secretary, conducted an investigation or engaged in conciliation under section 810 shall not present or prosecute a charge before an administrative law judge under this section.

"(b) SERVICE OF COPIES OF CHARGE.—(1) After the Secretary issues a charge under section 810, the Secretary shall cause a copy thereof to be served—

"(A) on each respondent named in such charge, together with a notice of opportunity for a hearing on

the record at a place (in the vicinity in which the discriminatory housing practice is alleged to have occurred or to be about to occur) and at a time (not less than thirty days after the service of such charge) specified in such notice; and

"(B) on each aggrieved person.

"(2) On the request of a party and with the consent of all other parties, a hearing may be rescheduled for a time earlier than the time specified in such notice or a place other than that specified in such notice.

"(c) RIGHTS OF RESPONDENTS AND AGGRIEVED PERSONS.—(1) Any respondent named in such charge shall have the right to file an answer to the charge, to appear in person or otherwise and to present testimony at a hearing on the record, and to obtain the issuance of subpoenas under section 811.

"(2) any aggrieved person with respect to such charge shall have the right to intervene in the proceeding, to appear in person or otherwise and to present testimony at such hearing, and to obtain the issuance of subpoenas under section 811.

"(d) RESOLUTION OF CHARGE.—Any resolution of a charge before a final order under this section shall require the consent of the aggrieved person on whose behalf the charge is issued.

"(e) EFFECT OF TRIAL OF CIVIL ACTION ON ADMINISTRATIVE PROCEEDINGS.—An administrative law judge shall not continue administrative proceedings under this section regarding any alleged discriminatory housing practice after the beginning of the trial of a civil action commenced by the aggrieved party under an Act of Congress or a State law, seeking relief with respect to that discriminatory housing practice.

"(f) FINDINGS AND CONCLUSIONS, AND ORDER.—(1) After the hearing under this section, the administrative law judge shall promptly make findings of fact and conclusions of law.

"(2) If the administrative law judge finds that a respondent has engaged or is about to engage in a discriminatory housing practice, such administrative law judge shall promptly issue an order for such relief as may be appropriate, which may include—

"(A) compensation for actual damages suffered by the aggrieved person as a result of the discriminatory housing practice;

"(B) punitive damages; and

"(C) an order requiring the respondent to cease and desist from engaging in the discriminatory housing practice with respect to the aggrieved person and to

take such action as is necessary to make the aggrieved person whole.

"(3) No such order shall affect any contract sale, encumbrance, or lease executed before the issuance of such order and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the charge filed under this title.

"(4) In the case of an order with respect to a discriminatory housing practice that occurred in the course of a business subject to a licensing or regulation by a governmental agency, the Secretary shall, not later than the thirtieth day after the date of the issuance of such order (or, if such order is judicially reviewed, thirty days after such order is in substance affirmed upon such review)—

"(A) send copies of the findings of fact, conclusions of law, and the order, to that governmental agency; and

"(B) recommend to that governmental agency appropriate disciplinary action (including, where appropriate, the suspension or revocation of the license of the respondent).

"(5) In the case of an order against a respondent against whom another order was issued within the preceding five years under this section, the Secretary shall send a copy of each such orders to the Attorney General.

"(6) If the administrative law judge does not find that the respondent has engaged or is about to engage in a discriminatory housing practice, such administrative law judge shall dismiss the charge. The Secretary shall make public disclosure of each such dismissal.

"(g) SERVICE OF FINDINGS AND CONCLUSIONS AND ORDER.—The Secretary shall cause the findings of fact and conclusions of law made with respect to an order issued under subsection (f), together with a copy of such order, to be served on each aggrieved person and each respondent in the proceeding.

"(h) FINALITY OF ORDER; REVIEW.—(1) An order of the administrative law judge is the final order for purposes of judicial review under this title.

"(2)(A) Any party aggrieved by an order of the administrative law judge granting or denying in whole or in part the relief sought may obtain a review of such order under chapter 158 of title 28, United States Code.

"(B) Notwithstanding such chapter, however, venue of the proceeding shall be in the judicial circuit in which the discriminatory housing practice is alleged to have occurred, and filing of the petition for review shall be not later than thirty days after the date of service of such order.

"(i) COURT ENFORCEMENT OF ADMINISTRATIVE ORDER UPON PETITION BY SECRETARY.—(1) The Secre-

tary may petition any United States court of appeals for the circuit in which the discriminatory housing practice is alleged to have occurred or in which any respondent resides or transacts business, or the Court of Appeals for the District of Columbia Circuit, for the enforcement of the order of the administrative law judge and for appropriate temporary relief or restraining order, by filing in such court a written petition praying that such order be enforced and for appropriate temporary relief or restraining order.

"(2) The Secretary shall file in court with the petition the record in the proceeding. A copy of such petition shall be forthwith transmitted by the clerk of the court to the parties to the proceeding before the administrative law judge.

"(j) RELIEF WHICH MAY BE GRANTED.—(1) Upon the filing of a petition under subsection (h) or (i), the court may—

"(A) grant to the petitioner, or any other party, such temporary relief, restraining order, or other order as the court deems just and proper;

"(B) affirm, modify, or set aside, in whole or in part, the order, or remand the order for further proceedings; and

"(C) enforce such order to the extent that such order is affirmed or modified.

"(2) Any party to the proceeding before the administrative law judge may intervene in the court of appeals.

"(3) No objection not made before the administrative law judge shall be considered by the court, unless the failure or neglect to urge such objection is excused because of extraordinary circumstances.

"(4) The findings of the administrative law judge with respect to questions of fact shall not be set aside unless such findings are unsupported by substantial evidence on the record taken as a whole.

"(k) ENFORCEMENT DECREE IN ABSENCE OF PETITION FOR REVIEW.—If no petition for review is filed under subsection (h) before the end of the forty-fifth day after the date of the service of the administrative law judge's order, the administrative law judge's findings of fact and order shall be conclusive in connection with any petition for enforcement—

"(1) which is filed by the Secretary under subsection (i) after the end of such day; or

"(2) under subsection (1).

"(l) COURT ENFORCEMENT OF ADMINISTRATIVE ORDER UPON PETITION OF ANY PERSON ENTITLED TO RELIEF.—If before the end of the sixtieth day after the date of service of the administrative law judge's order, no petition for review has been filed under subsection (h), and the Secretary has not sought enforcement of the order under subsection (i), any person entitled to relief under the order may

petition for a decree enforcing the order in the United States court of appeals for the circuit in which the discriminatory housing practice is alleged to have occurred.

"(m) ENTRY OF DECREE.—The clerk of the court of appeals in which a petition for enforcement is filed under subsection (k) or (l) shall forthwith enter a decree enforcing the order and shall transmit a copy of such decree to the Secretary, the respondent named in the petition, and to any other parties to the proceeding before the administrative law judge.

"(n) ATTORNEY'S FEES.—Any prevailing party may be awarded a reasonable attorney's fee as part of the final order in any administrative proceeding based on a charge issued by the Secretary, or by the court, in any proceeding for review or enforcement of such an order, as part of the costs. The United States shall be liable for such fees and costs the same as a private person.

"ENFORCEMENT BY PRIVATE PERSONS

"SEC. 813. (a) CIVIL ACTION.—(1)(A) An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than two years after the termination of an alleged discriminatory housing practice or a noncompliance with a conciliation agreement entered into under this title to obtain appropriate relief with respect to such discriminatory housing practice or noncompliance.

"(B) The computation of such two-year period shall not include any time during which an administrative proceeding under this title was pending with respect to a complaint or charge under this title based upon such discriminatory housing practice or the discriminatory housing practice to which such conciliation agreement pertains.

"(2) An aggrieved person may commence a civil action under this subsection whether or not a complaint has been filed under section 810(a) and without regard to the status of any such complaint, but if the Secretary or a State or local agency has obtained a conciliation agreement, no action may be filed under this subsection by the aggrieved person with respect to the alleged discriminatory housing practice which forms the basis for such complaint filed with the Secretary except for the purpose of enforcing the terms of such an agreement.

"(3) An aggrieved person may not commence a civil action under this subsection with respect to an alleged discriminatory housing practice which forms the basis of a charge issued by the Secretary if an administrative law judge has commenced a hearing on the record under this title with respect to such charge.

"(b) APPOINTMENT OF ATTORNEY BY COURT.—Upon application by a person alleging a discriminatory housing

practice or a person against whom such a practice is alleged, the court may—

"(1) appoint an attorney for such person; or

"(2) authorize the commencement or continuation of a civil action under subsection (a) without the payment of fees, costs, or security, if in the opinion of the court such person is financially unable to bear the costs of such action.

"(c) RELIEF WHICH MAY BE GRANTED.—In a civil action under subsection (a) the court may grant as relief, as the court deems appropriate, actual damages, any permanent or temporary injunction, temporary restraining order, and other relief, including punitive damages, and may allow the prevailing party a reasonable attorney's fee as part of the costs. The United States shall be liable for such costs the same as a private person.

"(d) EFFECT ON CERTAIN SALES, ENCUMBRANCES, AND RENTALS.—Relief granted under this section shall not affect any sale, encumbrance, or lease executed before the granting of such relief and involving a bona fide purchaser, encumbrancer, or tenant, without actual notice of the filing of a complaint with the Secretary or civil action under this title.

"(e) INTERVENTION BY ATTORNEY GENERAL.—Upon timely application, the Attorney General may intervene in such civil action, if the Attorney General certifies that the

case is of general public importance. Upon such intervention the Attorney General may obtain such relief as would be available to the Attorney General under section 814(e) in a civil action to which such section applies.

"(f) CIVIL ACTION TO COMPEL COMPLIANCE BY OFFICIALS.—A person harmed by a failure to comply with section 808(d) or 808(e)(6) may, in a civil action against any person or entity having the power to secure such compliance, obtain appropriate relief to compel such compliance.

"ENFORCEMENT BY THE ATTORNEY GENERAL

"SEC. 814. (a) PATTERN OR PRACTICE CASES.—(1) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this title, or that any group of persons has been denied any of the rights granted by this title and such denied any of the rights granted by this title and such denial raises an issue of general public importance, the Attorney General may commence a civil action in any appropriate United States district court.

"(b) ON REFERRAL FOR PROMPT JUDICIAL ACTION.—(1) Upon referral by the Secretary under section 810(e), the Attorney General may commence a civil action for appropriate temporary or preliminary relief pending final disposition of the complaint under section 810. Any temporary restraining order or other order granting preliminary or temporary

relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure.

"(2) The commencement of a civil action under this subsection shall not affect the initiation or continuation of administrative proceedings under section 810 and section 812 of this title.

"(c) ON REFERRAL OF DISCRIMINATORY HOUSING PRACTICE OR CONCILIATION AGREEMENT FOR ENFORCEMENT.—(1)(A) The Attorney General may commence a civil action in any appropriate United States district court for appropriate relief with respect to a discriminatory housing practice referred to the Attorney General by the Secretary under section 810(g).

"(B) A civil action under this paragraph may be commenced not later than the end of the eighteenth month beginning after the termination of the alleged discriminatory housing practice.

"(2)(A) The Attorney General may commence a civil action in any appropriate United States district court for appropriate relief with respect to noncompliance with a conciliation agreement referred to the Attorney General by the Secretary under section 810(c).

"(B) A civil action may be commenced under this paragraph not later than the end of ninety days after the referral of the alleged noncompliance under section 810(c).

"(d) ENFORCEMENT OF SUBPOENAS.—The Attorney General, on behalf of the Secretary, or other party at whose request a subpoena is issued, under this title, may enforce such subpoena in appropriate proceedings in the United States district court for the district in which the person to whom the subpoena was addressed resides, was served, or transacts business.

"(e) RELIEF WHICH MAY BE GRANTED IN CIVIL ACTIONS UNDER SUBSECTIONS (a) AND (c).—(1) In a civil action under subsection (a) or (c), the court—

"(A) may award such preventive relief, including a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for a violation of this title as is necessary to assure the full enjoyment of the rights granted by this title;

"(B) may award such other relief as the court deems appropriate; and

"(C) may, to vindicate the public interest, assess a civil penalty against the respondent—

"(i) in an amount not exceeding $50,000, for a first violation; and

"(ii) in an amount not exceeding $100,000, for any subsequent violation.

"(2) In a civil action under this section, the court may allow the prevailing party (other than the United States) a

reasonable attorney's fee as part of the costs. The United States shall be liable for costs the same as a private person.

"(f) INTERVENTION IN CIVIL ACTIONS.—Upon timely application, any person may intervene in a civil action commenced by the Attorney General under subsection (a) or (c) which involves an alleged discriminatory housing practice with respect to which such person is an aggrieved person or a conciliation agreement to which such person is a party. The court may grant such appropriate relief to any such intervening party as is authorized to be granted to a plaintiff in a civil action under section 313.

"RULES TO IMPLEMENT TITLE

"SEC. 815. The Secretary may make rules (including rules for the collection, maintenance, and analysis of appropriate data) to carry out this title. The Secretary shall give public notice and opportunity for comment with respect to all rules made under this section.".

SEC. 9. TECHNICAL AMENDMENT TO SECTION 817.

Section 817 is amended by striking out the last sentence thereof.

SEC. 10. CONFORMING AMENDMENT TO TITLE IX.

Section 901 is amended by inserting ", handicap (as such term is defined in section 802 of this Act), familial status (as such term is defined in section 802 of this Act)," after "sex" each place it appears.

SEC. 11. CONFORMING AMENDMENTS TO TITLE 28 OF THE UNITED STATES CODE.

(a) JURISDICTION.—Section 2342 of title 28, United States Code, is amended—

(1) by striking out "and" at the end of paragraph (4);

(2) by striking out the period at the end of paragraph (5) and inserting "; and" in lieu thereof; and

(3) by inserting after paragraph (5) but before the matter beginning "Jurisdiction is invoked" the following:

"(6) all final orders of an administrative law judge under section 812 of the Fair Housing Act.".

(b) DEFINITION.—Section 2341(3) of title 28, United States Code, is amended—

(1) by striking out "and" at the end of subparagraph (B);

(2) by striking out the period at the end of subparagraph (C) and inserting "; and" in lieu thereof; and

(3) by adding at the end the following:

"(D) the administrative law judge, when the order is under section 812 of the Fair Housing Act.".

SEC. 12. DISCLAIMER OF PREEMPTIVE EFFECT ON OTHER ACTS.

Nothing in the Fair Housing Act as amended by this Act limits any right, procedure, or remedy available under the Constitution or any other Act of Congress not so amended.

SEC. 13. EFFECTIVE DATE AND INITIAL RULEMAKING.

(a) EFFECTIVE DATE.—This Act and the amendments made by this Act shall take effect on the one hundred and eightieth day beginning after the date of the enactment of this Act.

(b) INITIAL RULEMAKING.—In consultation with other appropriate Federal agencies, the Secretary shall, not later than the one hundred and eightieth day after the date of the enactment of this Act, issue rules to implement title VIII as amended by this Act. The Secretary shall give public notice and opportunity for comment with respect to such rules.

○

Senator SIMON. We will follow the 5-minute rule, as is customary in Senate committees. We have the little lights here. When the light goes from green to red, that is an indication that your time is up. We would ask the witnesses to enter their full statements; they will be entered in the record. If you can informally summarize and we can devote more time to questions, and that is appreciated.

We are very pleased to have as our first witness the Secretary of Housing and Urban Development, Secretary Pierce.

Mr. Secretary.

STATEMENT OF HON. SAMUEL R. PIERCE, JR., SECRETARY, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Secretary PIERCE. Thank you very much, Mr. Chairman. It is a great pleasure for me to address this subcommittee, and I thank you for the opportunity to testify on behalf of——

Senator SIMON. Do you want to pull that mike just a little closer to you there? Thank you.

Secretary PIERCE [continuing]. On behalf of the administration and the Department of Housing and Urban Development on amendments to the Fair Housing Act.

When I began my term as Secretary of HUD in 1981, I made it clear that enforcement of title VIII of the Civil Rights Act of 1968 would be one of my highest priorities. I vowed to do what I could to strengthen that law and to eventually seek an amendment which would sufficiently ensure the equality of housing choice in America.

Honest men can disagree, and the debate over how to amend the Fair Housing Act and the extent of damages and relief offered to its victims has shown us how diverse honest men's views can be.

But I believe that we have come a long way in the past 6 years toward a commonality of purpose, and today and in the days ahead you will hear testimony that shows that we have indeed found common ground; 1987 may well be the year that will offer a new beginning to hundreds of thousands of minority and disabled homeseekers. I pledge to do whatever I can to help this committee develop what I want to be the finest piece of fair housing legislation ever enacted by Congress.

Let me start my discussion by briefly reviewing the current enforcement procedures. There is provision for both judicial and administrative enforcement under title VIII of the Civil Rights Act of 1968.

On the judicial side, there is government enforcement through the pattern or practice jurisdiction of the Department of Justice. This provides only injunctive relief. The federal government does not sue directly for damages for individual victims. The act, however, provides for private actions for discriminatory practices to be brought in Federal district courts or in appropriate State or local courts.

On the administrative side, the act provides for enforcement at the Federal and at the State or local level. At the Federal level, administrative enforcement is limited to investigation and resolution of complaints by informal methods of conference, conciliation and persuasion.

The statute expresses a strong preference for administrative enforcement at the State or local level. It provides that if a complaint is filed with HUD which alleges activity that would violate a State or local law that provides rights and remedies substantially equivalent to those provided by the Federal law, then HUD must refer the complaint to the agency administering the State or local law.

The enforcement mechanism of title VIII has been criticized almost from the day of its enactment. Most of that criticism has been concentrated on Federal administrative enforcement and its limitation in individual cases to conciliation. If the parties are not willing to conciliate, the Secretary of HUD has no authority to go elsewhere. This is an obvious weakness.

Successive Secretaries of HUD have made attempts to enforce fair housing despite weaknesses in the statute. Even when our own Federal enforcement attempts were inadequate, we have tried to provide assistance to the State and local fair housing agencies.

So it is logical that since the beginning of the eighties, there has been an obvious change in fair housing enforcement because of the increasing role of state and local administrative enforcement agencies.

We acknowledge that their role continues to be highly critical in delivering speedy relief to victims. To help these agencies, HUD developed a funding program designed to enhance the capacity of State and local fair housing agencies, called the Fair Housing Assistance Program, or FHAP.

Later, a competitive component called FHAP Type II was designed to promote innovative enforcement mechanisms by these agencies. Under this program, fair housing groups were contracted with by the State and local agencies to use testers to uncover discriminatory housing practices.

Private enforcement is essential. Private enforcement has been the trigger for many of the greatest strides in civil rights in our history, and the Supreme Court has recognized that the private attorneys general have a particularly unique role under the Fair Housing Act.

The principal development here was the *Havens Realty Corporation* v. *Coleman* decision by the Supreme Court in 1982, in which the Court held that testers who had been lied to about the availability of units had standing to sue in their own right. The Court also in that decision gave standing to private fair housing organizations to sue to recover damages for actual injury to their own purposes and programs resulting from discriminatory practices in the housing market. In both holdings, the Supreme Court adopted a position that was urged upon it by this administration in an amicus brief.

After the Supreme Court upheld testing, it was apparent that this tool could be more widely used to reduce housing discrimination. Consequently, HUD designed the Fair Housing Initiatives Program, or FHIP, to provide financial and other assistance to State, local, and private fair housing groups engaged in testing activities.

Nationally, we have instituted voluntary affirmative marketing agreements with the major housing industry groups which commit

these organizations to activities designed to make the industry aware of its rights and responsibilities under the law.

Major education and outreach programs have been implemented by these groups at their own expense and have aided community-based organizations, such as community housing resource boards, with their own outreach goals.

But probably nothing is as effective in promoting fair housing as the promise of stiff penalties for offenders and generous damages to victims. These cases in civil court have been aided by able attorneys who have come to realize that fair housing and fair lending is a growing aspect of American law practice today.

HUD for several years has been offering advanced legal education in the field of fair housing and fair lending. We have provided seminars throughout the country to attorneys hoping to practice in this area.

It has become apparent to us that oftentimes the speediest and most satisfying conclusion to a fair housing complaint is achieved at the local level. The number of States whose laws have been recognized as providing rights and remedies substantially equivalent to those provided under the Federal Fair Housing Act has risen from 22 at the end of 1977 to 34 at the present time, plus the District of Columbia.

We now recognize 65 substantially equivalent localities, including at least 7 that are outside the 35 recognized States. There has been a higher percentage of cases in which a successful resolution is reached, a decrease in the amount of time required to obtain resolution and improvements in the quality of relief, such as a housing unit received by successful complainants.

We believe that this trend is encouraging because of the nature of the acts of discrimination that we are trying to prevent. It is the multitude of daily acts of discrimination in the housing market against individuals victims across the nation that must be our principal concern.

This subcommittee if familiar with the often-quoted audit survey of American housing markets that was conducted by the National Committee Against Discrimination in Housing in 1977 and published in 1979 under a HUD research grant.

That survey reported that in a typical search for a rental or purchase involving visits to four sales or rental agents, a black seeking to purchase a home had a 48-percent chance of encountering discrimination on at least one visit and a black seeking to rent had a 72-percent chance of encountering discrimination on at least one visit.

I have been encouraged by the increasing importance of the State and local agencies and I have done what I could to provide them with much-needed assistance, but I recognize that there can never be true housing opportunity in this country until the Federal enforcement powers in title VIII have been strengthened. At present, there is no forceful backup mechanism which provides an incentive to bring parties to the conciliation table with serious intent to resolve issues then and there.

It is appropriate to defer to state and local jurisdictions where their own laws cover adequately the same offense, in addition to being practical, given the nature and multiplicity of the violations.

But as the President has continually asserted, enforcement of civil rights is a Federal responsibility which cannot be abdicated.

The administration will propose legislation to amend the Fair Housing Act, and I have read the Kennedy-Specter bill now being considered. As I said earlier, we have moved to more common ground and the differences exist only in two areas which I will discuss.

More importantly, let me address the areas of general agreement. First, we say that any legislation enacted by Congress needs to include four basic objectives. Foremost is the need for strengthened enforcement. The most glaring deficiency in title VIII, as I have stated, is the inability of the Federal Government to move people toward conciliation and have the decision be binding. A speedy, effective backup mechanism is essential.

Second, as you may be aware, I have long supported fines for those who break the law. It is agreed that up to $50,000 for a first offense and up to $100,000 for a second offense would make housing discrimination a very expensive proposition.

Third, I feel strongly that the Secretary of HUD should be empowered to initiate complaints. Last, the legislation needs to be expanded to include handicapped persons as a protected class.

As I said earlier, the administration is in the process of completing a bill. I expect that the administration bill will be submitted in time to be considered by this subcommittee, and it pleases me that both the administration's bill and the Kennedy-Specter bill include these four principles.

Although the Kennedy-Specter bill would institute an administrative law judge procedure as a back-up to conciliation, I expect the administration bill will propose arbitration as an alternative dispute mechanism. It is my feeling that arbitrators should be granted the authority to award relief, including awarding occupancy of the dwelling, as well the authority to issue cease and desist orders, levy actual damages, and to additionally be able to assess civil penalties in an amount of up to $50,000 for a first offense and up to $100,000 for a second offense.

The second area of difference between the administration bill and Kennedy-Specter is the inclusion of family status as a protected class under civil rights law. I realize that this provision has stirred a great deal of debate as to whether family status is an appropriate Federal protection.

Because the debate on this provision is expected to be lengthy, I feel that separate legislation to address family status should be considered. We will continue to process complaints involving families with children under the existing protections of race and sex.

But once again, I look at our areas of common concern and interest more than in the few areas where we have identified differences in our approach. I would like to offer any technical assistance, data or encouragement that this subcommittee or its staff may require.

The spirit that inspired the Kennedy-Mathias bill and then the Kennedy-Specter bill, and the spirit that inspired the administration bill are kindred spirits. I know, working together, we will put forth legislation that will hearten Congress and that I will be proud to enforce at HUD.

You know, 2 years ago I hung a large banner in front of my Department that read, "Fair Housing: '85 Is Our Year." Well, I might have gotten the year wrong, but I never lost faith that I would see the day as Secretary when a law would be passed that would truly ensure each American of his right to live where he chooses for as long as he can afford to do so without fear or prejudice.

Thank you very much.

Senator SIMON. Thank you, Mr. Secretary, and we appreciate your willingness to work with us on this matter.

Incidentally, unless there is objection, we will follow the 10-minute rule for committee members.

You summarize this very well when you say, "I recognize that there can never be true housing opportunity in this country until the Federal enforcement powers in title VIII have been strengthened."

You talk about an administration bill. I know that Senator Hatch introduced a bill the latter part of last week, S. 867. Is that the administration bill?

Secretary PIERCE. No. The administration bill is not finished yet. We are still in the process of working on it. We hope to have it finished shortly and have it up here while this subcommittee is still in session considering this legislation.

Senator SIMON. And as I understand your testimony, one of your main differences will be simply that you give appreciably more power to an arbitrator and do not refer a case to an administrative law judge. That arbitrator would have the authority to levy fines up to $100,000 in the process. Is that correct?

Secretary PIERCE. Yes. Well, actually, we are thinking of using arbitration. We want to have two kinds of arbitration. One would be when the two parties would agree to binding arbitration. The decision resulting from such arbitration could not be appealed. The parties would agree to it and it would not be appealed. Under such arbitration there would be no civil penalties.

The other kind would be more formal, more like an administrative law judge proceeding where there would be a transcript taken and there could be a penalty, and the decision could eventually be appealed to the court of appeals. That would be the second type of arbitration.

There would be two types of arbitration. If the parties agreed to just have binding arbitration, they could get their dispute resolved very speedily.

Senator SIMON. And when you say a court of appeals, would it go directly to a U.S. Circuit Court of Appeals, or are you talking about an appeal process within the Department?

Secretary PIERCE. No; an appeal process. It would be an appeal process.

Senator SIMON. Within the Department?

Secretary PIERCE. Yes.

Senator SIMON. How are arbitrators chosen?

Secretary PIERCE. We are working on that, but we expect them to probably be chosen through the American Arbitration Association. But we are working on that and I do not want to say that is the final answer, but that is part of our discussion.

Senator SIMON. And if your modification of the Kennedy-Specter bill were to be approved, when would it go into effect? Do you have a date agreed upon yet?

Secretary PIERCE. I would want it to go into effect as fast as possible, immediately.

Senator SIMON. All right.

Senator Specter.

Senator SPECTER. Thank you very much, Mr. Chairman.

Mr. Secretary, I am delighted to hear at the outset your statement that you speak for the Administration in the areas of agreement. That is true?

Secretary PIERCE. Yes, in the areas where we have agreement.

Senator SPECTER. OK, and one of those areas is that there will be HUD enforcement, because that is a significant departure from existing law where enforcement has been vested exclusively in the—the Department of Justice had enforcement so far as the Federal Government was concerned.

But the administration has agreed that your Department, HUD, ought to have enforcement powers as well?

Secretary PIERCE. It would have the power to initiate litigation.

Senator SPECTER. All right. Well, that is the enforcement power.

When you talk about the distinction between an administrative law judge and arbitration, I think we have a very critical difference of opinion as to what is the more effective way of enforcement.

Arbitrators characteristically do not have the power to impose fines. When you talk about civil penalties or criminal penalties, it does not make a whole lot of difference what the name is. If you impose a fine of $50,000 or $100,000, it really is punitive in nature, and I quite agree with you that that is an appropriate, tough measure.

But I have grave doubts, having brought cases into arbitration, having tried cases before administrative law judges, and also in the Federal district courts, that there is an appropriate procedure to have arbitrators impose fines.

Do you know of any precedents, Mr. Secretary, for arbitrators to impose fines?

Secretary PIERCE. No. It exists in certain organizations, but that is because the organizations agreed to it, but not where it is a fine that can be appealed to a court.

Senator SPECTER. Well, you were a practicing lawyer at one time like me, and I know of no procedures where arbitrators have the authority to impose fines.

Secretary PIERCE. Well, we do not either. We are looking at it; we are studying it. But because something never happened before does not mean it cannot be, and when we finish researching it, maybe we will have to back off of it, but this is where we want to go.

Senator SPECTER. Well, I would agree with you on the proposition that because it has not been done, that does not mean it cannot be done. But if you are searching for a procedure to provide strong teeth and enforcement, in the absence of a precedent for an arbitrator to impose a fine, I would suggest to you that you may be in-

viting a major challenge as to sufficient judicial authority to have that kind of a sanction imposed.

Certainly, an arbitrator could not impose a jail sentence. I have grave doubts just sitting here, without having researched it, that there is precedent for an arbitrator to impose a criminal penalty in the nature of a fine.

I would suggest that we do study the issue further to see if there is any precedent for an arbitrator imposing a civil fine because if there is not that kind of precedent, then I think we would be inviting a challenge, perhaps on constitutional line, that arbitrators would be exceeding the traditional kinds of authority given to arbitrators.

Secretary PIERCE. Well, we certainly will, and we would certainly have that all researched by the time a legislative proposal is submitted.

Senator SPECTER. Mr. Secretary, I would have a further concern about the efficacy of an arbitration procedure when you deal with orders to give occupancy or orders for cease and desist. In your testimony, you touched on those two critical aspects of remedy.

An administrative law judge has substantial powers which are defined under existing law. Here again, and this is different from giving an arbitrator the authority to impose a penalty even in the nature of a civil fine, but I have doubts as to whether there is an appropriate background or precedent for an arbitrator to issue an order which is in the nature of an equitable remedy, and a cease and desist order or an order for occupancy would be in the nature of an equitable remedy.

So here again, whereas an administrative law judge has, by tradition, judicial powers, as the name states, and they are lawyers, arbitrators traditionally do not have that kind of judicial power.

I would be interested if you know of any precedent for arbitrators to issue orders in the nature of equitable or injunctive relief.

Secretary PIERCE. Again, this will all be thoroughly researched, but I would say this. I do not see why they should not be able to. You could limit the arbitrators that are selected to certain types of lawyers. There are plenty of them; they are very good, they are excellent.

They could handle this, it seems to me, as well, maybe even better than an administrative law judge. Their backgrounds, their skills, their abilities are just as good.

Senator Specter. Well, I think it is possible to do that, but, again, when you are outside of an established framework for equitable orders to be issued, I raise the concern about the potentiality for problems there.

If you refer matters to the American Arbitration Association—and I share your high regard for the American Arbitration——

Secretary PIERCE. No, we would not necessarily refer the matters to them. We would get our arbitrators from them, but a lot of the details of what they would do and how they would perform would be determined by regulations that would be issued by the Secretary of HUD; either that or they may be put into the legislation.

Senator SPECTER. Well, if you take the arbitration route, you are going to be looking to an arbitration procedure which is established. The American Arbitration Association, of course, has estab-

lished procedures as to how the arbitration is initiated, how arbitrators are selected, how the hearings are held, all of the procedures.

If you rely upon the American Arbitration Association panels, their panels have some lawyers, but their panels have many who are not lawyers.

Secretary PIERCE. Yes, but you can have only lawyers on the panel if you want. I know that because we have done that a few times.

Senator SPECTER. That is possible to do, but it just strikes me that when you start to search for an enforcement mechanism that we have a well established enforcement mechanism with the administrative law judges. So I would urge your consideration of that as you structure your bill and the consideration of these issues.

Let me question you just briefly in the time that I have remaining on the issue of standing for families and children to try to see to it that we do not have discrimination in that important category.

Would you amplify the reasoning for excluding that important class for protection from legislation?

Secretary PIERCE. Well, there are a number of people who feel as though it really is a state and local issue that should be handled by them and not by the Federal Government. There is also some feeling that it should not be brought into this particular legislation because it has differences that do not appropriately fit into this legislation.

There are some who claim that too much attention would be placed on the discrimination of families with children, and not enough attention would be given to racial problems.

There is a lot of, as I say in the testimony, debate about this, and so maybe it should be separated out and handled separately.

Senator SPECTER. Why should the protection of families with children be more of a state and local matter than other forms of discrimination?

Secretary PIERCE. Well, those who argue this say that, first of all, it is not as big a problem by any means. When you take that report that was just made where you have 2 million alleged cases of racial discrimination in housing per year, you do not get anywhere near that in family discrimination; nowhere near it. So just in size alone, it is a much bigger problem.

Senator SPECTER. Well, it may be true that numerically it is not as significant, but obviously to those who are affected, it is highly significant.

Secretary PIERCE. Oh, yes, I have no question about that.

Senator SPECTER. Well, we will have witnesses who will testify to the scope and depth of the problem. My own sense is that we ought to strike while the iron is hot on this important area, as well as the others in the bill. But we will consider your views on that, of course, very carefully.

Thank you very much, Mr. Secretary. Thank you, Mr. Chairman.

Senator SIMON. Thank you, Senator Specter.

If I could just add one comment here, Mr. Secretary, you mention that you are studying this whole proposition as you get ready for a bill. This subcommittee intends to move fairly fast, so if you

can instruct your staff to move on this so that we can have your input in the very near future, we would appreciate it.

Secretary PIERCE. I certainly will. It is not just my staff; it is the Attorney General and OMB. There are a number of hands in this, but we are moving as fast as we can.

Senator SIMON. I understand.

Secretary PIERCE. And as you move and debate, we will get it done as fast as we can. I want it done as fast as possible and I will stay on it.

Senator SIMON. Great.

Senator Kennedy.

Senator KENNEDY. Thank you.

Obviously, Mr. Secretary, you have given a good deal of thought as to the enforcement mechanism. As you can tell from the questioning here and the opening statements, we have given thought to these mechanisms as well.

I think that in this exchange we saw highlighted the concerns about using the arbitration mechanism as opposed to administrative law judges. We have questions about who is going to appoint the arbitrators, the issue of judicial authority. I think we are going to face some questions with regard to the authority of the administrative judge in ordering certain kinds of penalties without a jury trial. In any event, we are going to have to deal with that, and that is a complex constitutional issue, the whole question of power to impose penalties and injunctions.

Another area of concern is really the lack of experience. As former Chairman of the Administrative Procedures Committee and as one who has followed the administrative process, one of the things I have found very impressive is that administrative judges have developed a very profound degree of knowledge and expertise in these particular areas in which they work.

If administrative law judges were to hear housing discrimination cases, there could be quickly established a whole series of case law and opinions that would be enormously helpful and useful to all of those who are attempting to deal with the law in this area. That, I think, is something which impels us to move towards the administrative judges procedure.

Some of us believe that that process of using the administrative judge has been tried, and is working. We find in OSHA, for example, that those judges are able to order civil penalties and have a number of the powers that we are talking about in terms of this bill.

I would like to go back just a step. I want to develop the record of the need for the bill. I think that you have expressed it eloquently in your statement. I think many of our colleagues are really going to want to know if there is a need out there.

I gather from what you have just said here about the number of complaints that come to HUD that there is an important need; that housing discrimination is a problem in the United States today, and it is a compelling problem.

I think it is important that we understand that, first, if it is the case—you are the one that has to make it—second, is that there is the need. And, third, I wish you would elaborate on the fact that there is not now an existing mechanism within your Department,

78-076 O - 88 - 3

and within the Justice Department, to really come to grips with this problem.

That is what I think the Members of the Congress and the American people have to know, and that we are just not trying to pass some piece of legislation that is going to harass a number of people.

Secretary PIERCE. Well, there is no doubt that there is great need for legislation in this area, as any major or minor study done on this subject in recent years will show. The conclusion is that there is a great deal of discrimination in this area. In fact, it is one of the last areas of real subtle, sophisticated discrimination left in this country.

It is done frequently. Sometimes it is very hard to detect. That is one of the reasons why we are putting such an emphasis on testing.

Senator KENNEDY. You support the use of testers?

Secretary PIERCE. We do.

Senator KENNEDY. Do you feel that they are absolutely essential in terms of attempting to cope and deal with this problem?

Secretary PIERCE. That is right, and if this problem were not so difficult, we would not care about testing; we would just think the mechanism was not necessary. But it is necessary, and we felt very strongly about that and we were very glad when the Supreme Court recognized it.

Senator KENNEDY. Now, on the question of housing discrimination, could you just comment briefly about how invidious this discrimination is? Could you just elaborate on how important discrimination in housing is, and how that effects other aspects of American society?

How important is it for us as a country to address this if we are attempting to try and eliminate what I would consider to be the major last area of discrimination, not only on the basis of race, but for those who are handicapped and for families as well?

Secretary PIERCE. I think it is most important for people to be able to live where they want to and where they can afford to live. If you think of people who are products of mixed neighborhoods, blacks who have been able to live in an area where there have been a number of white families, I think you will find as you talk to people like that that they feel more comfortable with whites and, I might add, whites feel more comfortable with them.

I think it helps the relationships of this country. You do not make such a great distinction between blacks and whites; they get to know each other. One of the problems with this country is blacks have never gotten to know whites and whites have never gotten to know blacks to any great extent. I think it helps to have a relationship that way, to know each other better.

Then school, of course, is most important because so many of our schools are based on neighborhoods and if you are in an all-black neighborhood, unfortunately, the schools are not as good. That should not be, but that is what happens. They do not give as much money to them and the better teachers do not go there, and the black children get a tough break.

So you meet friends whom you know and have contact with through life, and a lot of times some of your white colleagues may be in a position to help you along later on in life, and vice versa; a black may be able to help a white. This relationship can grow

better and stronger, and I think it all starts with the very beginning, where you live and how you live.

Senator KENNEDY. Well, I think that is an excellent summation about the need and why this really is a major priority, I think, for this Congress in this bicentennial year.

Let me focus your attention on the handicapped provisions. We welcome your support for that change in the legislation.

How important is this provision? I think you have mentioned that it will be in the administration proposal and it is in our proposal.

Secretary PIERCE. We think it is very important, and obviously it is a horrible thing when somebody limps a bit or has a speech impediment, or whatever, and goes to a landlord and cannot get into a building. It is ridiculous in a way because we do not make the landlord make changes for that person.

If changes are made, the handicapped person has to remodel or have the building remodeled and changed when he leaves so that the building will be the same as when he came in, if there are any changes in stairways and that sort of thing.

Senator KENNEDY. But you think it is important that we have those provisions to protect those who, because they have some physical disability, might be discriminated against?

Secretary PIERCE. Absolutely.

Senator KENNEDY. Let me just go into two other areas. This is on the issue of affirmative marketing, and I imagine during the course of the hearing we will be hearing about HUD's efforts to encourage affirmative marketing and outreach by communities seeking to promote integration. I think we will hear statements made that the law is indefinite in that area.

What is your sense? Is the law sufficiently clear? That is number one. The second question is, do you believe that those who oppose this legislation because of that question are really raising a red herring?

Secretary PIERCE. When you say affirmative—what was the word, affirmative——

Senator KENNEDY. What they call it is "affirmative marketing." They claim that the law regarding what those in the real estate business may do is not sufficiently clear. In particular, they have attacked HUD's efforts to encourage affirmative marketing and outreach by communities seeking to promote integration.

Secretary PIERCE. Well, we have done a great deal in that area through our voluntary programs and agreements that we have with housing industry groups all over the country.

We have pushed and pushed and pushed, but the trouble is what happens so often in this country is you can have affirmative outreach, you can try to influence people; you can talk to them, you can try to educate them. But until you come down to make things rough by law, you just will not get anywhere.

I think that is what happened with some things we think of as simple, ordinary rights like eating in a restaurant or staying at a hotel. When the law got to the point of declaring you cannot discriminate anymore, everybody got used to it.

Senator KENNEDY. Yes.

Secretary PIERCE. And I think that people will get used to it when the law gets tougher in housing.

Senator KENNEDY. I think it is important to know that under our bill we also have an arbitration provision under which people can agree to submit their case to arbitration and be bound by that. I think that the concept is worthwhile. I think that the Secretary has mentioned the reasons why it is advantageous. We have tried to anticipate that and have that provision included dealing with arbitration.

I want to thank the Secretary very much, and I look forward to working with him. He has been very forthcoming, I believe, and I think this will be an enormously important achievement if we are able to get this passed.

I thank the Chair.

Senator SIMON. Thank you, Senator Kennedy.

Thank you, Mr. Secretary. I think the underlying point that you make is that you have to have greater enforcement powers if we are going to move significantly on this problem of discrimination—I think that is clear, and we appreciate your coming here and giving us that message.

Thank you.

Senator SPECTER. Mr. Chairman, if I may make just one more comment?

Senator SIMON. Yes, Senator Specter.

Senator SPECTER. As Senator Kennedy notes, there are provisions for arbitration by agreement of the parties, but that is very carefully drawn when the party aggrieved is looking for a remedy which does not require the strength of judicial enforcement.

I realize, Mr. Secretary, as you responded to Senator Simon's comment about expedition, that you have to deal with the Department of Justice and OMB and there is not perfect agreement as to the remedies, and that you have to structure something within the Administration.

But when you go back and argue this case as to whether you are going to settle for just an arbitration remedy, I would urge you to press upon them these issues as to whether there are precedents, whether they are not really moving into a morass of procedure if they seek arbitration and are looking for these kinds of remedies of fines and the remedies of cease and desist orders and occupancy orders.

When you testify about the subtlety of discrimination, I think you are exactly on target. It is very subtle, and I think that is why you need a degree of sophistication that an administrative law judge has to really understand these matters.

Even if you take experienced lawyers who are not in this field, they are not really going to understand all of this. I think that the judges give you two qualities, sophistication and strength, and I would use the word "strength" as opposed to "toughness."

But there is a quality about being hailed into court. As Justice Black said in *Gideon* v. *Wainwright,* when you are hailed into court, it is different than if you come into an arbitration procedure. I believe that really sets the parameters as to what we are looking at, and I think 1987 is our time to really get this legislation through.

At least speaking for myself, I would not want to see us settle for arbitration when we really need something with more sophistication and more strength.

Senator KENNEDY. I would just underline that. The Secretary was talking about being able to use a device in a situation where the parties agree on how it can be resolved. We have got a provision for that; but that, as I think all of us understand, is really not what is at issue. What is at issue is the administrative law judge and procedure.

I appreciate the Chair letting me clarify that point. Thank you.

Senator SIMON. Thank you very much again. We hope you can erect that banner for fair housing 1987 this year.

Next, we will hear from a panel: Althea Simmons, the legislative director of the NAACP; Raul Yzaguirre, National Council of La Raza; Irene Natividad, National Women's Political Caucus.

Marca Bristo, who does a great job with the National Council on Independent Living, is from my State of Illinois. Bishop James Malone, from the United States Catholic Conference, was to be here, but got caught in a snowstorm in Ohio.

Again, if you can give us a 5-minute summary, we will enter your full statements in the record. In order to move things along, I will try and be fairly firm on the 5-minute rule, giving the Secretary a little more leeway than I would give other witnesses here today.

Ms. Simmons.

A PANEL CONSISTING OF ALTHEA T.L. SIMMONS, DIRECTOR, WASHINGTON BUREAU, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; RAUL YZAGUIRRE, PRESIDENT, NATIONAL COUNCIL OF LA RAZA; IRENE NATIVIDAD, CHAIR, NATIONAL WOMEN'S POLITICAL CAUCUS; AND MARCA BRISTO, PRESIDENT, NATIONAL CENTERS ON INDEPENDENT LIVING

Ms. SIMMONS. Thank you, Mr. Chairman. I am Althea T.L. Simmons, director of the Washington bureau, NAACP. I am substituting this morning for Dr. Hooks, who, because of airline schedules has not arrived.

Fair housing is NAACP's top priority in the 100th Congress, and we certainly commend this subcommittee for its longstanding efforts to pass legislation to put teeth into the Fair Housing Act of 1968.

As you know, the NAACP has been deeply involved in trying to achieve fair housing for some 12 million black Americans for a long time. We think it is now time to make that a reality. I believe it is appropriate to say that when the law was passed in 1968, it was passed under great stress. Dr. King had been killed. The bill was bottled up. We tried to get a final vote on the bill.

When you consider the circumstances, a great step was made at that time because we did get a national policy statement on open housing. However, there were no teeth in the law.

Many black Americans know there are no teeth in the fair housing law, and although our NAACP branches across the country re-

ceive a number of complaints, most complainants do not submit written complaints and go the administrative route.

One of our branches from Louisiana said very simply, "People think nothing is to be gained; it is not worth the effort because HUD cannot help them get an apartment or a house."

We believe that one of the chief defects in the existing fair housing law is the lack of an adequate enforcement mechanism. We know that there is still discrimination in housing. The survey made by the Dallas Morning News in 1985 is as relevant today as it was when it was reported in 1985.

It is our belief, based on feedback from across the country, that persons are still denied housing because of race, because of children in families, and also—we have run into this quite a bit—because welfare is the source of family income, and that should not be.

Our branches also report that blacks face different financing conditions. For example, mortgage lenders require higher down payments or terms different that those required of whites, especially if blacks are attempting to move into non-black neighborhoods.

The selling price of a house or the rental rate of an apartment is raised when the prospective buyer or tenant is black. Higher interest rates are charged to black would-be homebuyers, and sometimes blacks are denied financing altogether, ostensibly because of bad credit reports.

But on closer examination, the report in many instances was read subjectively, with a view toward denying the loan to the applicant. Black prospective homebuyers face more stringent credit reports, resulting in bad credit ratings, and they are often charged larger security deposits than white tenants.

We still have the time-honored practice problems of racial steering by too many real estate dealers. Our branches report that they receive complaints that blacks are steered away from white residential neighborhoods even when there is a "for sale" sign in the front yard of the house.

Managers, and/or realtors still give stereotypical statements that property values tend to go down when minorities move in. We believe that something must be done to make fair housing for all Americans a reality in this country.

The NAACP believes that some of the major weaknesses of the current law can be discerned from the housing reports we get from our local units. Let me share a couple of things with the committee.

Although the statute authorizes HUD to study the extent of discriminatory housing practices, publish reports and disseminate them, among other things, the last report was made in 1979, so that we do not know how much more discrimination there is.

The absence of such reporting by HUD was not unnoticed by the NAACP because two years ago we passed a resolution specifically calling on this administration to uniformly collect housing discrimination data, assimilate it, analyze it, report on it, and disseminate those reports from a central place in HUD.

The NAACP is also concerned about the fact that HUD cannot compel parties to meet and discuss the provisions of a conciliation agreement. One of our Denver branch officials said, "people are

emotionally upset when housing discrimination happens to them and they are just too disgusted to sit and talk about it."

The lengthy administrative action diverts one's energies away from looking for a place to live, and by the time HUD has obtained a conciliation agreement, the buyer has moved on and dropped interest.

In addition to that, we think there are some other problems that black Americans and others face that ought to be called to the attention of this Committee, and that is the whole concept of redlining.

This is a longstanding concern of the NAACP. We have taken a very strong position against any type of redlining that would categorize neighborhoods on the basis of racial occupancy and declare some of them off limits for financing, insurance, or other purposes.

We believe the Federal Government has a special responsibility because the government at one time was responsible for fostering just such a practice through FHA. We think that both the secondary mortgage market and the secondary insurance market must be covered.

It is our understanding—and we are not technical experts in this area—that there is such a market in insurance contracts. So we urge that discrimination in re-insuring as well as insuring be prohibited.

The NAACP also feels that redlining prohibitions could be strengthened by the inclusion of specific language prohibiting discrimination on the basis of geographic location. We additionally suggest that some timeliness be placed on the action that Federal agencies with authority to prevent housing discrimination are directed to take, in cooperation with the Secretary of HUD.

We wholeheartedly support this bill. We ask this subcommittee, the full committee and the Senate to move very swiftly on it and to let persons long denied the opportunity to have equal access to fair and open housing.

Thank you, Mr. Chairman.

[The prepared statement of Benjamin Hooks follows:]

TESTIMONY

OF

BENJAMIN L. HOOKS

CHIEF EXECUTIVE OFFICER/EXECUTIVE DIRECTOR

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Mr. Chairman and members of the Subcommittee, I am Benjamin L. Hooks, Chief Executive Officer/Executive Director of the National Association for the Advancement of Colored People. Accompanying me today is Ms Althea T. L. Simmons, Director of our Washington Bureau.

The NAACP, now in its 79th year, is the oldest and largest national civil rights association in the country. It has 2100 branches and youth units in the 50 states and the District of Columbia.

The NAACP commends this Subcommittee for its long-standing efforts to pass legislation to put teeth into the Fair Housing Act of 1968. The NAACP, as you know, has been deeply involved in a continuous effort to make fair housing for some 12 million black Americans, and others, a reality.

This Subcommittee is also aware that Ms Simmons' predecessor, Clarence Mitchell, Jr., as Director of the NAACP's Washington Bureau, launched a historic campaign, working relentlessly against filibusters, other legislative maneuvers, and the considered judgment of others that it could not happen, to help secure passage of the 1968 law. When most people had given up--Clarence was unadaunted.

It is appropriate, in this testimony, to urge the Subcommittee to recall the turbulent circumstances under which that statute was passed -- the tragic death of Dr. Martin Luther King, Jr., during congressional consideration of the bill; the ensuing urban disorders; the filibuster on the Senate side that called for extra effort, not only to pass the bill, but even to bring it to a final vote. Considering the circumstances, the Congress took a giant step forward for civil rights in enacting the fair housing act. For the first time since the post-civil war era, federal legislation specifically addressed the problem of discrimination in the housing market. Yet, because of the pressures the Congress was working

under, it was unable to pass a bill that contained all of the provisions that you or we would have preferred. As a consequence, it is necessary to amend the statute to address the issues we still face in 1987.

When the 1968 Fair Housing Act was passed, it was a national policy statement on open housing which denounced racial and other forms of discrimination; directed HUD to obtain voluntary compliance from private individuals or businesses, and authorized court action. The statute did not address involuntary sanctions to compel compliance.

The NAACP and others have used the law for its intended purpose, namely combatting forms of discrimination. Many black Americans know that the law has no teeth in it; therefore, although our NAACP branches receive a number of verbal complaints regarding discrimination because of race, most of them do not submit written complaints to our branches, HUD or to a state or local agency.

We talked with one of our Denver branches in 1986 and reconfirmed the information this year about housing discrimination. Our branch informed me that it hears of approximately 60 to 70 complaints during a year. Another branch in Louisiana in response to our query said: "People think there is nothing to be gained--its not worth the effort; HUD can't help them get an apartment or a house." Our Detroit Central Branch hears about 30 to 40 housing discrimination complaints a year and refers them all to a local fair housing agency. An official of that agency estimated that it handles about 200 complaints annually without advertising its services. Our Cincinnati branch reports that it handles several nundred complaints a year using advertising. The branch estimated that roughly two-thirds of these are filed with HUD and one-third result in lawsuits.

In 1985 HUD reported receiving 4,882 complaints, although, to my knowledge it has not issued an extensive report on housing discrimination since 1980. The last report indicated over 2 million instances of housing discrimination.

Mr. Chairman, and members of the Subcommittee, discrimination in housing still occurs. The Dallas Morning News, several years ago did an extensive reporting job on the extent of discrimination in this nation. That study is relevant today.

Lack of an Adequate Enforcement Mechanism

The chief defect in the existing fair housing law is its lack of an adequate enforcement mechanism. The NAACP learned long ago that reliance on individual lawsuits in the field of civil rights does not produce the desired results. Therefore, when Congress passed the historic Civil Rights Act of 1964, and the Voting Rights Act of 1965, it included in both laws provisions that put the Federal government in the position of being the primary enforcer of those laws. The Congress failed to do that when it passed the Fair Housing Act. Instead, it allowed the Attorney General to file suits, but only in pattern or practice cases that raise issues of general public importance. The Attorney General's input, as a result, has failed to have much impact on practices in the housing market. Moreover, the individual who wishes to pursue a remedy is forced to make a sometimes confusing choice of whether or not to go through the administrative procedure before seeking court relief. Whatever the choice, he/she is faced with a relatively short statute of limitations that could further add to his/her confusion.

Mr. Chairman, and members of the Subcommittee, our nation must have a law which authorizes the Secretary of HUD to proceed administratively or refer the matter to the Attorney General for action in the courts. Under existing law, the Secretary of HUD is virtually powerless to act against private discriminators, Upon receipt of a complaint of a discriminatory housing practice, the Secretary is authorized to conduct an investigation. However, even when the Secretary finds a flagrant violation of law, all the Secretary can do is seek to conciliate between the violator and the complainant. If the guilty party decides to persist in breaking the law, he/she is free to do so knowing, in most instances, that the complainant lacks the funds to file a lawsuit and also knowing that the Secretary of HUD is powerless to stop him.

Housing Discrimination is still prevalent

Black Americans and others still complain of housing discrimination. Our branches routinely receive complaints from people who allege that they have been denied housing because of race, national origin, the presence of a

handicapped person in the family, the presence of children in the family; and Mr. Chairman, because welfare is the source of family income.

A New York City woman applied for a rental unit in a brownstone. The applicant was told that the landlord did not rent to "welfare tenants". Denial of housing, because of one's source of income is not unlawful under the Fair Housing Act or the Equal Credit Opportunity Act.

In Houston, a black family bought a house in a newly-built white subdivision. The closing occurred after whites acted as intermediaries to conceal the race of the purchasers. After moving in, the black family was presented with legal challenges made by white residents of the subdivision. The whites sought to enforce a restrictive covenant which prohibits owners from selling to non-caucasians.

The NAACP contends that is unconscionable that racially restrictive covernants are still being used despite the landmark Supreme Court decision in Shelley v. Kraemer, and the 1968 Fair Housing Act.

Mr. Chairman and members of the Subcommittee, those of us in this room know that such covenants are unlawful. The Fair Housing Act, statutorily prohibits the refusal to sell a house to individuals because of race. The Act, however, gives the alleged victim only the option of obtaining a conciliation agreement through HUD or going to court. Many of our constituents and other low-income individuals cannot afford the long, arduous, and expensive litigative route to equality.

In 1986, a white tenant living on Park Avenue in New York City faced eviction. She contended that the eviction was racially motivated because she took in a black co-tenant. A complaint was lodged by the two with one of our New York City branches and the State Human Rights Commission. Fortunately, for them, they were in a position to pursue a legal remedy, which is not the case for a large number of black Americans and others whose incomes fall under the official poverty level as calculated by the Federal government. I have cited the New York City and Houston cases to show that, regardless of income, black Americans still suffer the indignity of race-based discrimination.

Our Indianapolis branch reports that it has received a number of complaints that a prospective renter or buyer elicits information on the telephone

that a housing unit is available. When the black applicant shows up to formally apply for the unit, curtains are drawn suddenly in the unit and the applicant is told that there are no vacancies. Here again, there is reason to suspect that the Fair Housing Act has been violated. However, here, as happens all too frequently, the homeseeker opts to look for housing elsewhere without filing a complaint under the Act.

It has also been reported that some white resident managers inform our branches that they cannot rent to black tenants. These managers, however, are unwilling to speak "on the record."

In Cincinnati, Ohio, a black tenant evicted by new building owners suspected that the eviction was racially motivated. After the tenant complained to our local branch, a local non-profit Fair Housing organization sent "testers" out to investigate. The alleged violation of the Fair Housing Act was substantiated by the testers. The woman was informed of her options--a complaint to HUD or taking the matter to court. She decided to take the court route because the administrative options under the Fair Housing Act were perceived as not being as effective as the court option.

Racially Discriminatory Financing Terms

Our branches report that blacks face different financing conditions. For example, mortgage lenders require higher downpayments or terms different than that required of whites, especially if blacks are attempting to move into "non-black" neighborhoods. The selling price of a house or the rental rate of an apartment unit is raised when the prospective buyer/tenant is black. Higher interest rates are charged to black would-be home buyers; and, sometimes, blacks are denied financing altogether, ostensibly because of "bad credit reports", but on closer examination, the report, in many instances, was read subjectively, with a view toward denying the loan to the applicant. Black prospective homebuyers face more stringent credit reports resulting in "bad credit ratings". Black prospective tenants are often charged larger security deposits than white prospective tenants.

Racial Steering

"Racial Steering" is still a "time-honored" practice by too many real

estate dealers. Our branches report that they receive complaints that blacks are steered away from white residential neighborhoods, even when there is a "for sale" sign in the front yard or houses in that neighborhood. Stereotypical justifications are given, e.g., "if too many blacks move in the building property values will go down"; "it will be harder to attract white tenants who are generally better able to pay the rent." These justifications, among others, were deemed ill-founded during the course of the enactment of the Fair Housing Act in 1968, yet they survive to effectively deny housing opportunities to blacks.

Families with Children

Many branches receive complaints from people who are told they cannot rent a place because they have children. Stereotypically, the owner or manager perceives that "children will tear up the place", "bring down property values or rental values", "make it harder to get other tenants", among other excuses.

Physical Disability

Handicapped people have complained that they are denied rental units because of their handicap. Oftimes managers tell the applicant that the building is not equipped to meet their special needs with little or no discussion being had regarding what changes can be made to accommodate a handicapped applicant.

Mr. Chairman, the types of conduct engaged in which results in the denial of housing opportunities could be listed and detailed with more specifics; however, I think the examples I have given in this testimony suffices to show that, categorically, people are denied housing opportunities for identifiable reasons - handicap, source of income, race, children in the family.

The Fair Housing Act must be amended to prohibit discrimination against the handicapped and families with children. The amendment should be carried throughout the act to give them a legal cause of action and relief.

The statute authorizes, at a glance:

- o Hud research and reports on housing discrimination (42 U.S.C.§3608(d);
- o Hud voluntary compliance methods (42 U.S.C. §3608(b)
- o Hud administrative action initiated by private persons claiming housing discrimination (42 U.S.C. §3610(a)
- o Hud investigations, hearings, subpoena power and criminal fines for disobedience (42 U.S.C. §3610(a)(b);
- o Civil court action initiated by a private person (42 U.S.C. §3610(d), 3612;
- o Civil court relief, as it deems appropriate (42 U.S.C. §3612(c); and,
- o Civil action initiated by the Attorney General (42 U.S.C. §3613).

Major weaknesses of some of these provisions can be discerned from housing problems reported to local NAACP branches and others. Let me just share with the Committee our views re some of the weaknesses we perceive.

The Statute authorizes HUD to study the extent of discriminatory housing practices, publish and disseminate reports and render technical assistance (42 U.S.C. §3608(d). HUD last reported on the extent of housing discrimination in 1979. At that time over 2 million instances of housing discrimination were reported. No reports have been issued since 1979. Moreover HUD has been cajoled into not even collecting data on racial and other forms of discrimination.

This absence of HUD official reporting has not gone unnoticed by the NAACP. Our 77th Annual National Convention passed a resolution specifically calling on this Administration to uniformly collect housing discrimination data, assemble it, analyze it, report on it, and to disseminate the reports from a central place in HUD. Without this data, enforcement of fair housing suffers nationally and the problems of fair housing are ignored, if not deemed of minimal national interest by officials.

HUD Voluntary Compliance Methods

It is recognized that the statutorily-authorized forms of voluntarily compliance, conciliation and persuasion, are inadequate administrative enforcement methods. Each HUD Secretary, beginning with Dr. Robert Weaver

and including Secretary Samuel Pierce, has decried that conciliation is inadequate.

HUD cannot even compel the parties to meet and discuss the provisions of a conciliation agreement, As a Denver NAACPer reported, people are emotionally upset when housing discrimintion happened to them and they are too disgusted to sit and merely talk.

HUD Administrative Action Initiated by Private Persons

The Act authorizes private persons to file a written complaint with HUD about an alleged fair housing act violation (42 U.S.C. §3610(a). Within 30 days HUD is to act on the complaint; however, no outward time limitation is statutorily provided to resolve the complaint.

Lengthy administrative action diverts one's energies away from looking for a place to stay. By the time HUD has obtained a conciliation agreement, "the buyer or tenant has moved on and drops interest" according to one of our Baton Rouge branch officials.

Our branch workers report frustration as a result of inadequate staffing in HUD offices at the Regional and/or local level. It is also evident that the workload is piling up in local HUD offices. Last year, the San Jose branch of the NAACP commented to our staff that work on fair housing complaints in the local HUD office was not being assigned to HUD staffers, vacancies were not being filled and moral was low among the workers. He noted that there is a sense or atmosphere of withdrawn Federal support for fair housing enforcement over the past few years.

HUD Investigations, Hearings, Subpoena Power and Criminal Fines

The Act authorized HUD to investigate complaints, conduct hearings, etc. and to issue criminal fines up to $1,000 for noncompliance with the subpoena (42 U.S.C. §3610(a). NAACP branches report that these investigations are useful for factfinding and to obtain evidence. However, after the investigation, complainants opt to file court action, if they are able, to seek monetary damages . Upon court trial, HUD administrative action must stop, as required in 42 U.S.C. §3610(f). In effect, the results of the HUD investigation, as stated by an NAACP housing counselor, "is to obtain leverage to

negotiate settlement to a lawsuit". In sum, "most complainants by-pass the administrative process."

Civil Court Action Initiated by a Private Person

Under 42 U.S.C. §§3610(d), 3612 a private person can file a suit in court to enforce the act. Many NAACP branches report that court action is complicated, time-consuming and expensive. Many people bringing complaints to NAACP branches cannot afford to consult with an attorney, much less retain one, even on a contingent fee basis. Hence this option, for all practical purposes, is not available to many poor or low-income persons facing housing discrimination.

Mr. Chairman and members of the Subcommittee, I have spent the major portion of this statement focusing on the feedback we have received from our branches across the country. Now let me focus the remainder of my remarks on key provisions of the Fair Housing Act of 1987.

Section 6 addresses discriminatory housing practices for persons with handicapping conditions and families with children. The blatant practice of denying housing to the handicapped is often couched in terms of economic feasibility, i.e., the building structurally cannot accommodate the special physical needs of the handicapped person. It then becomes a question of whether structural changes can be made and who will pay for such changes both to accommodate the special physical needs of the would-be tenant and to restore the structure to its pre-rental condition. S 558 addresses this issue by making it unlawful to refuse to permit, at the expense of the handicapped person, reasonable modifications if such are necessary.

The bill also amends the Fair Housing Act of 1968 by adding "familial status" to the category of persons protected from discriminatory housing practices. S 558 gives people a legal cause of action by prohibiting housing discrimination because of children.

Section 7 of S 558 expands the authority of the Secretary of HUD to administer the Fair Housing Act. It imposes a duty on each federal agency with authority over any program to prevent or eliminate discriminatory housing practices to cooperate with HUD by studying discriminatory housing practices,

publishing and disseminating reports, rendering technical assistance and engaging in action designed to affirmatively further the purposes of the housing act.

The Secretary of HUD would also be required to submit a report to the Congress on housing discrimination. The lack of data collection has been a serious problem in recent years. Under the Reagan Administration, OMB has impeded the collection of housing discrimination data by HUD. The result of this action has been to shift this functional responsibility which Congress intended HUD to have, to private groups with limited resources. These private groups have attempted, to the best of their resources, to identify discriminatory housing practices by type of practice, targeted group(s), the extent of the practice etc.

Section 8 of S 558 revises administrative enforcement authority. Currently, an aggrieved person must file a complaint under the Fair Housing Act within 180 days after the occurrence of the alleged discriminatory act. S 558 changes this by allowing a person up to one year after the occurrence to file a complaint. This one year time limitation is consistent with statutes of limitations allowing one year for personal injury tort suits. This one year time period serves another purpose. It provides an opportunity for the aggrieved party to take care of the immediate need--that of finding shelter before tackling the problem of filing a complaint. In many instances, the problem of finding affordable housing, together with the usual demands of employment, home and family take precedence over the complaint process and the aggrieved party finds that the 180 days has expired leaving him/her without recourse.

Currently, the Secretary of HUD has 30 days after receiving a complaint to notify the complainant whether HUD intends to resolve it, refer it to a "substantially equivalent state or local agency" for it to resolve the complaint or take no action on it. S 558 changes this by requiring HUD to serve notice not later than ten days after receipt, with the respondent having 10 days after notice to file an answer. The result is that a complaint can be acted upon administratively in short order.

Use of Administrative Law Judges

The NAACP supports the section of the bill which authorizes administrative law judges to conduct hearings on HUD issued "charges". Administrative law judges are a significant part of our federal adjudicating system. They outnumber federal district judges almost two to one and decide infinitely more cases. Few people in their lifetimes are involved in direct contact with the judicial process; most people will have direct involvement only with an administrtive agency. When agency action occurs, whether by rule, order, license, sanction or relief, if a dispute arises the most expeditious resolution is by an independent and impartial hearing. The NAACP, in 1979 passed a resolution calling for more administrative law judges. The NAACP believes that the use of administrative law judges will provide a useful mechanism to address the complaints of aggrieved individuals in an expeditious fashion. These judges are governed by the Administrative Procedure Act, and under this measure the order of the Administrative Law Judge is the final order for purposes of judicial review.

"Redlining" in the Insurance Industry

Mr. Chairman and members of the Committee, the NAACP could not end its statement without referring to the need for a prohibition of so-called "redlining" in the home insurance industry. This represents a reaffirmation of the NAACP's long-standing policy position. We have taken very strong positions against any type of redlining that would categorize neighborhoods on the basis of racial occupancy and declare some "off limits" for financing, insurance or other purposes. We believe the federal government has a special obligation here, because the government itself is responsible for fostering such a practice in the developing years of FHA by allowing that agency to consider racial homogeneity as a factor in reaching a decision on insurability. It is reassuring to note that the sponsors of this measure have recognized that responsibility by providing a section which deals with discrimination in financing of housing and insurance.

The NAACP's experience leads us to believe that many persons lack confidence in the present enforcement procedures. Some of them, upon finding that the administrative procedure does not guarantee a sure remedy, even if

discrimination is proven, and lacking financial resources necessary to seek legal redress in the courts, abandon their complaints. They will gain confidence if they discover that, if discrimination does exist, the Secretary of HUD or the Attorney General is in a position to render assistance.

The NAACP believes that both the secondary mortgage market and the secondary insurance market must be covered. It is our understanding--and we are not technical experts in this area--that there is such a market in insurance contracts, so we urge that discrimination in re-insuring as well as insuring be prohibited. The NAACP also feels that the "redlining" prohibitions could be strengthened by the inclusion of specific language prohibiting discrimination on the basis of geographic location. Additionally, we suggest that some time limits be placed on the action that the federal agencies, with authority to prevent housing discrimination, are directed to take in cooperation with the Secretary of HUD.

Mr. Chairman, we appreciate this opportunity to testify on S 558 and urge the Subcommittee, the full Committee, and the Senate, to take speedy action to move S558 toward final enactment.

Senator SIMON. Thank you very much, Ms. Simmons.
Mr. Yzaguirre.

STATEMENT OF RAUL YZAGUIRRE

Mr. YZAGUIRRE. Thank you, Mr. Chairman. My name is Raul Yzaguirre. I have some prepared testimony I would like to submit for the record.

Senator SIMON. It will be entered in the record.

Mr. YZAGUIRRE. Thank you.

Let me start off by saying that the National Council of La Raza fully supports the passage of Senate bill 558. Let me tell you some of the reasons why we support this bill.

As an organization interested in the welfare of Hispanics, we believe we have a very serious problem in terms of housing in our community. One-third of Hispanic families live in physically inadequate or overcrowded housing, compared to only 10 percent for non-Hispanic or white families.

Hispanics pay a greater percentage of their incomes for the privilege of living under substandard conditions. Hispanics are underrepresented as homeowners. The total average of home ownership among U.S. families is 65 percent; for Hispanics, it is only 43 percent.

We believe that housing discrimination is at least a partial factor for the poor housing conditions in the Hispanic community. In 1979, the Department of Housing and Urban Development did a study in Dallas which you quoted, Mr. Chairman, in your February 19 press conference, and that study found that the chances of a dark-skinned Hispanic experiencing some form of housing discrimination is an alarming 96 percent. Even a light-skinned Mexican American was apt to experience discrimination at a level of 65 percent.

Only last year another HUD-funded study in Phoenix found evidence of differential inducement for whites as compared to blacks and Hispanics; that is, whites were given rewards and incentives to rent homes, whereas blacks and Hispanics were asked to pay higher rents, higher deposits, and receive lower deposit refunds.

The demographics of the Hispanic population suggest a second form, and a very serious form of discrimination, and that is discrimination based on the size of your family. Hispanics have an average of 2.3 children, as compared to 1.9 children for the non-Hispanic population. Therefore, this is a serious issue in our community.

The reason we support this bill is because we believe that the existing legislation has two major weaknesses. One of them is the enforcement provision, and the other one has to do, of course, with the question of large families.

The record shows that Hispanics do not file complaints in the level suggestive of the discrimination they experience. From 1980 to 1985, complaints filed by blacks compared to Hispanics outnumbered Hispanics by 11 to 1. Yet, the black population is only 37 percent larger than Hispanics. We believe there are several reasons for this discrepancy.

Of course, the black population is larger and probably experiences more overt forms of discrimination. But we also believe that Hispanics are less likely to file civil rights complaints, in general, and particularly in terms of fair housing, partly because we know that they do not have the kinds of information and the kinds of understanding of their rights.

HUD no longer publishes brochures explaining fair housing laws in languages other than English. Of course, as has been well documented and stated in this hearing, housing discrimination is often very subtle and only the more blatant forms can be readily ascertained.

The Secretary talked a little bit about the relationship between housing discrimination and schooling, and we think that is a very important linkage. This committee might be interested to know that Hispanics have been found to be the most segregated population in schools in this country.

Another reason why we have problems in this area is because our institutions simply do not have the kind of financial strength to be able to pursue these issues very aggressively.

Some of the remedies that we support besides the passage of this bill include replication of a very important project that HUD entertained some years back. It was called the Fair Housing Enforcement Demonstration Project. It worked in nine jurisdictions and it had a special outreach and public information campaign, and it resulted in a dramatic increase in the filing of complaints and the adjudication of these complaints.

Let me begin to conclude my presentation by recommending several initiatives; first of all, the passage of this act. Second, I think we need much more in the way of Hispanic-focused research. The research that we have suggests that there is a problem, but it does not document it to the fullest extent.

We also need to fund more housing anti-discrimination programs. We have only been able to identify one of these programs which at least partially deals with Hispanics, and that, we think, has got to be dramatically changed.

Thank you for the opportunity to present testimony.

[Prepared statement follows:]

PREPARED STATEMENT OF
RAUL YZAGUIRRE
PRESIDENT
NATIONAL COUNCIL OF LA RAZA

I. INTRODUCTION

Mr. Chairman, members of the Subcommittee, my name is Raul Yzaguirre and I am President of the National Council of La Raza, one of the largest national Hispanic organizations. The National Council is a Washington, D.C.-based, nonprofit organization dedicated to improving life opportunities for Americans of Hispanic descent. We represent more than 50 local community-based organizations operating in 32 states, the District of Columbia, and Puerto Rico, who together provide education, employment, housing, health, community development, and social services to about one million Hispanics annually.

We are pleased that the Subcommittee is holding hearings on this legislation, because the issue of fair housing and the problems of housing discrimination do not receive the attention they deserve. In addition, the issue of fair housing is usually discussed solely in the context of racial bias. While the data clearly show that Black Americans continue to face severe housing discrimination, too little attention has been focused on similar problems faced by Hispanic Americans. Therefore, we sincerely appreciate this opportunity to appear before you today to present our views on S. 558, the Fair Housing Act of 1987.

II. HISPANIC HOUSING PROBLEMS

A. Housing Conditions

It is widely recognized that Hispanics are among the most poorly housed groups in the nation. By virtually any measure, the data demonstrate that housing conditions for much of the Hispanic population are inadequate. About one-third of Hispanic families live in physically inadequate or overcrowded housing, compared to only 10% of White families.

Moreover, Hispanics pay a greater percentage of their incomes for the "privilege" of living under substandard conditions. A recent study for the National Low Income Housing Coalition showed that only families earning more than $25,000 annually have any reasonable expectation of paying less than 30% of their income for housing. While more than half of the total population can meet this standard, only

about one-third of Hispanic families earn $25,000 or more; Hispanic families are two and a half-times as likely as Whites to live below the poverty level.

Hispanics are seriously under-represented as homeowners; while the total average of U.S. families who own their homes was 65%, only 43% of Hispanics own own their own homes; thus, the availability of affordable rental housing is of critical importance to the Hispanic community.

B. Housing Discrimination

Low income alone cannot fully explain the poor housing conditions of the Hispanic population. According to a recent internal HUD study:

> When common factors contributing to housing deprivation are taken into account, differences in housing conditions among Whites, Blacks, and Hispanics are narrowed somewhat, but sizeable differences still remain... Blacks and Hispanics are twice as likely as Whites to be either inadequately housed or overcrowded, even when they have similar financial resources.

It is clear that factors other than income are partially responsible for poor Hispanic housing conditions. One of these factors is housing discrimination. While there has been considerably less research on the scope of housing discrimination against Hispanics than against Blacks, the available data show that housing discrimination against Hispanics is pervasive. For example:

- A 1979 HUD study in Dallas found that 42% of dark-skinned Mexican Americans and 16% of light-skinned Mexican Americans were given false information on the availability of rental units. The study further found that the chance of dark-skinned Mexican Americans experiencing at least one instance of discrimination in a typical housing search was 96%, and that the chances of light-skinned Mexican Americans experiencing similar discrimination was about 65%.

- A HUD-funded study in Denver in 1982 found that both Blacks and Hispanics tended to receive less information about available housing than Whites in both rental and sales markets, although the findings may not be statistically significant due to small sample sizes.

- A 1986 HUD-funded study in Phoenix found evidence of discriminatory rental practices against both Blacks and Hispanics in the areas of financial treatment. While Whites were given rewards and a variety of rental inducements, Blacks and Hispanics were asked to pay higher rents, deposits, and received lower deposit refunds.

These studies generally show that Hispanics, especially those with dark complexions, face housing discrimination at a rate equal to or greater than Blacks, at least in some markets. Clearly, both groups suffer from serious housing discrimination.

The demographics of the Hispanic population suggest that a second form of discrimination -- the practice of imposing rental restrictions on families with children -- has a disproportionate impact on the Hispanic community. The 1985 Current Population Survey shows that over 75% of Hispanic families have three

or more persons, a rough proxy for the presence of children, compared to less than 60% of non-Hispanic families. In 1983, Hispanic families had an average of 2.3 children, compared to 1.9 children for non-Hispanics. To the extent that housing discrimination against families with children is pervasive, (one national study found that only one-forth of all rental units accept children with no restrictions), Hispanics face a substantially higher risk of encountering such discrimination than non-Hispanics.

III. ENFORCEMENT OF FAIR HOUSING LAWS

A. Overview

Mr. Chairman, two major weaknesses in the enforcement system established by Title VIII of the Civil Rights Act of 1968 -- also known as the Fair Housing Act -- are well known. First, discrimination against families with children and discrimination against the disabled are not covered by Title VIII.

Second, its enforcement provisions are too weak. Under existing law, someone who believes that he or she has been discriminated against has two alternatives. The individual can file a formal complaint with HUD, which may then be conciliated by HUD or a state or local agency, if the state or locality has a "substantially equivalent" fair housing law. Resource constraints and the lack of incentive for speedy resolution of complaints, however, seriously undermine the effectiveness of the conciliation process. The only alternative to conciliation is to go to court, and for most victims, litigation is not a practical option. This is especially true for Hispanics and other low-income persons who often do not have the knowledge, resources, or access to skilled counsel necessary to successfully pursue litigation, or may not know where to file a complaint.

B. Need for Hispanic-focused Efforts

The National Council of La Raza believes that additional efforts specifically focused on Hispanics are essential to effectively address housing discrimination against Hispanics. The proposed legislation is limited to improving the effectiveness of the enforcement process after a complaint is filed. We believe that more must be done to increase the number of complaints from the Hispanic community. Despite evidence of pervasive housing discrimination against Hispanics, HUD data reveal that Hispanics tend to file very few complaints. According to HUD data:

- From FY 1980 through FY 1985, formal complaints filed with HUD certified fair housing state and local agencies by Blacks alleging discrimination totaled 14,172, while such complaints from Hispanics totaled 1,328: a ratio of about 11:1; yet the Black population is only about 37% larger than the Hispanic population.

- This pattern was consistent over the six-year period. The ratio of Black-to-Hispanic complaints exceeded 10:1 in every year except FY 1983 (9.4:1).

- Complaints from Hispanics as a percentage of total complaints ranged from 5.4% to 7.2% of total complaints, and exceeded 7% in only one year except FY 1983 (9.4:1).

Some of this differential is easily explained. The Black population is somewhat larger, and some studies suggest that in some markets, Blacks are more likely to encounter discrimination than Hispanics. Finally, it is possible that Blacks are more likely to encounter overt forms of discrimination than Hispanics, and are therefore more likely to know that they have been discriminated against. However, this does not explain the extent of the difference in complaints.

Hispanics are less likely to file civil rights complaints in general, and fair housing complaints in particular. Several important reasons for this differential have been suggested: first, Hispanics may not have a complete understanding of their rights; and second, all but the most blatant forms of housing discrimination frequently are not recognized as illegal discrimination by the victims. Some examples of subtle forms of housing discrimination are "steering," false information on the availability of rental units, and differential treatment in lending practices.

Furthermore, the weak enforcement mechanism in the present fair housing law may contribute to the low numbers of complaints filed by Hispanics. The lengthy period required to reach conciliation and the lack of any real redress to the victim, may deter Hispanic victims from filing complaints. In addition, rental agents and realtors are aware that they are not likely to be penalized for practicing illegal housing discrimination, and therefore, are not deterred from discriminating. These factors may limit confidence within the Hispanic community towards the HUD conciliation process, thus reducing the number of complaints.

Language differences may exacerbate both the above-cited factors. HUD no longer publishes brochures explaining fair housing laws in languages other than English, thus reducing the ability of limited-English proficient persons to understand their rights under the law. Limited-English proficiency may also hinder Hispanics from fully understanding what realtors or rental agents are telling them, thus limiting their ability to detect discrimination.

Another often ignored factor that helps to explain differences in the pro-

pensities of Blacks and Hispanics to file civil rights compliants is the disparity in the relative strength of civil-rights-oriented institutions in the two communities. The Black community has a long and proud tradition of strong, active civil rights groups such as the NAACP annd the National Urban League, which inform Black Americans of their rights, help and enourage them to seek redress, and advocate on their behalf. Their counterparts in the Hispanic community are much younger, have fewer resources, and are much more fragile.

The lack of strong civil rights-oriented Hispanic institutions is especially true with respect to fair housing, and HUD has not been effective in addressing this problem. A review of HUD Fair Housing Assistance Program (FHAP) grants to public and private fair housing groups reveals that very few grants have gone to groups emphasizing services to the Hispanic community. Moreover, HUD had not carried out a single fair housing initiative focusing on Hispanics. To the extent that building the capacity of state and local groups is at least partially a function of the availability of resources, it is not surprising that there are few strong local fair housing groups focusing on fair housing for Hispanics.

C. Remedies

The Fair Housing Enforcement Demonstration Project, sponsored by HUD and the National Committee Against Discrimination in Housing (NCDH), provides some insight into ways in which increased anti-discrimination activity can be generated. Under the Demonstration Project in 1981, small grants were provided to nine local fair housing groups to conduct fair housing testing and a limited amount of outreach and public information.

By all accounts, the Demonstration Project was successful, and resulted in a series of impressive achievements:

- In each area participating in the project, complaints rose dramatically. There was a relatively high rate of success in corplaint resolution.
- During the two-year period of the project, HUD recorded a dramatic increase in complaints (from 4,000 to 5,300); over 50% of this increase occurred in areas where the demonstration was being conducted.
- A modest amount of federal funding generated an extremely high level of activity. It is estimated that each dollar of project funding generated two to three dollars in activity by the local groups.

At least one of the demonstration groups, the Greater Dallas Housing Opportunity Council, carried out Hispanic-focused activities. Their efforts resulted in some increase in complaints by Hispanics, although the data do not

permit precise quantification of Hispanic-specific effects (we urge that future efforts provide separate data on Hispanics).

The activities carried out under the Demonstration Project clearly address many of the factors contributing to the low level of fair housing complaints by Hispanics. The local groups increased awareness of housing discrimination, provided counseling and technical assistance in filing complaints, and established a strong institutional presence in their respective communities. The National Council of La Raza believes that replication and expansion of Demonstration Project activities in Hispanic communities is essential to ensure that Hispanics are made aware of their right to equal housing opportunity and of the procedures victims of discrimination may follow to seek redress. Finally, an Hispanic-focused Demonstration Project would provide a unique opportunity to carry out research-oriented tests of a range of markets, to fill research gaps on the scope of housing discrimination against Hispanics.

III. CONCLUSIONS AND RECOMMENDATIONS

In summary, our analysis of housing discrimination against Hispanics suggests that:

- While Hispanic-focused research is sparse, the available data demonstrate that Hispanics suffer severe housing discrimination. The demographics of the Hispanic community suggest that Hispanics are also disproportionately effected by rental restrictions against families with children.

- Compared to Blacks, Hispanics tend to file very few complaints of housing discrimination. Possible differences in the scope and degree of such discrimination fail to account for the size of the disparity in complaints.

- HUD has carried out few Hispanic-focused enforcement efforts. Where such efforts have occurred, they have apparently been successful in stimulating fair housing activity by Hispanics.

The National Council of La Raza believes that strengthing the effectiveness of fair housing laws in protecting the rights of Hispanic Americans requires two major policy initiatives. First, we must strengthen the laws themselves by expanding coverage and establishing more effective enforcement mechanisms to resolve complaints. Hispanics and Blacks, particularly families with children, have neither the time or the financial resources to wait to have their complaints resolved. Second, we must increase the capacity of Hispanics to protect their rights to equal housing opportunities. This can best be achieved through:

- THE SUCCESSFUL PASSAGE OF S. 558.

- The establishment of a major Hispanic-focused fair housing initiative, which should consist the following:

  - Systemic testing, particularly if the focus is on Hispanics. This would provide more solid data on Hispanics and the housing discrimination they face.

  - Funding should be provided to Hispanic groups who are involved in fair housing activities in order to promote outreach and public education, receive and record complaints, conduct tests, and related to the ccomplaints and refer documented complaints to HUD.

  - HUD should, like in previous administrations, provide the necessary printed bilingual materials and personnel in order to inform the Hispanic community about their equal housing opportunities and complaint procedures.

We appreciate the opportunity to present our views and we again thank the Chairman for his support of civil rights for Hispanics and other minorities. As always, the National Council of La Raza stands ready to assist the Subcommittee in its efforts.

Senator SIMON. We thank you.
Ms. Natividad.

STATEMENT OF IRENE NATIVIDAD

Ms. NATIVIDAD. Thank you.

Good morning, Mr. Chairman. I am Irene Natividad, chair of the National Women's Political Caucus, a bipartisan membership, grassroots organization dedicated to the election and appointment of women to public office.

We also lobby on issues that are important to women and to families.

I am pleased to appear before you today in support of the effort to make fair housing a dependable reality—and I underline "dependable"—for every American, as S. 558 provides the opportunity to redeem the pledge of the original Fair Housing Act in a couple of ways, one by providing for a fair and effective program of enforcement which has been talked about this morning, and, second, by extending the coverage of the act to disabled Americans and to families with children.

My full testimony is before you and, in the interests of time, I am going to focus my remarks on the act's protection of familial status; that is, families. The National Women's Political Caucus believes firmly that there is no legitimate business reason to discriminate against families with children in the area of housing.

As a nation, we cannot simultaneously champion the virtues of the family—and as you well know, there has been a lot of talk about that lately—and yet turn our backs to the adults only, no children discrimination that increasingly limits the availability of rental units for households with offspring.

Indeed, we as a society are failing if we accept the notion of daily life in which families and children can be excluded as undesirables or as second-class citizens, if you will.

Now this assessment may sound hyperbolic, but let me tell you that the evidence is clear that discrimination against families is a serious problem in the housing marketplace.

HUD commissioned several major studies in 1980 as the rental market got tighter and they found that no-children policies jumped from 17 percent in 1974 to 26 percent in 1980.

Now, these exclusionary policies badly hurt families by causing them to search for longer periods of time for their housing or to pay higher costs for shelter of lower quality. There are those who may think that no-children admission practices are simply an ill that affects disadvantaged, low-income households.

Well, I am here to tell you that 73 percent of all American households in which children are present are all potential victims. There is a telling example of a case in which a married couple whose newborn child suddenly placed them in violation of their landlord's no-children restriction even though they already were renting a two-bedroom apartment. Only subsequent costly litigation allowed them to stay in that apartment.

Here is a startling fact. Nationwide studies by HUD found that 26 percent—that is, over a quarter—of all rental housing in the United States is closed entirely to children, and that another 50

percent imposed restrictions that limited the age or the number of children who could be admitted to residence.

So what you are looking at is a total of 76 percent of rental residences with restrictive policies for children. That is a lot of housing.

In some cities, the level of exclusion actually is even worse. For example, in California, prior to establishment of State protections, five major cities excluded children from at least half of local rental housing markets.

Now, the rationale for exclusion of children according to landlords is greater maintenance costs, noise, and higher expenses for utilities and insurance. Additionally, there are lifestyle preferences of some renters who favor living circumstances in which there are no children.

Whether one accepts these positions is a matter open to question, but it is clear to me that these do not appear to be sufficient justifications for denying the availability of millions of units of housing to families who are seeking a home.

The State interest in protecting the family, to me, is a fully adequate basis to establish anti-discrimination measures in the field of housing. Several studies have focused on no-children exclusionary practices, and they have concluded that they may be smokescreens for race or sex discrimination. As was mentioned before, Hispanic families tend to be larger.

When a landlord tells a black or Hispanic mother that he will not rent to her but states that his refusal is because of her children, not her race or her sex, he appears to act within the law. But for the victim, the effect of this discriminatory denial is the same regardless of its basis.

If prospects look grim for two-parent, low-income families, female-headed households, particularly those headed by minority women, are most vulnerable to no-children rental policies.

The Secretary before said that the numbers are not large in this category. Let me say that 12.5 million children live with their mothers only, and 70 percent of these female-headed households are persistently poor.

In closing, let me say, Mr. Chairman, that it is time to establish a national anti-discrimination standard for the treatment of families seeking homes anywhere in the United States, and I feel this bill will do that.

Thank you.

[Prepared statement follows:]

TESTIMONY OF
IRENE NATIVIDAD
CHAIR
NATIONAL WOMEN'S POLITICAL CAUCUS

Good morning, Mr. Chairman, I am Irene Natividad, Chair of the National Women's Political Caucus, a bi-partisan, grassroots, membership organization dedicated to the election and appointment of more women to public office. We also lobby on issues that are important to women and families. We represent 77,000 members and 350 State and local caucuses across the country.

The hearings the Subcommittee begins today on S. 558, legislation to strengthen and extend the coverage of the Fair Housing Act, are of great importance to women, families, and to our entire Nation. I am pleased to appear before you today in support of the effort to make fair housing a dependable reality for every American.

Mr. Chairman, fair housing is not a partisan issue. For example, two distinguished women who served as Secretary of Housing and Urban Development in Republican and Democratic administrations were leaders in criticizing the serious weaknesses of Title VIII of the Civil Rights Act of 1968. Both called on Congress to strengthen the Act. HUD Secretary Carla A. Hills in the Ford Administration denounced the enforcement weaknesses of Title VIII as an "invitation to intransigence" on the part of violators. Secretary Patricia Roberts Harris, a Democrat, voiced similar concerns, calling Title VIII a "law without teeth" that was an embarrassment to her Department.

Mr. Chairman, the 1968 Fair Housing Act promised much to the Nation but has delivered far too little in terms of actual civil rights protection in the nearly twenty years since its passage. The Act announced that "the policy of the United States" is the provision of "fair housing throughout the United States." Indeed, the Act prohibited virtually all acts of discrimination in housing. But, remarkably, the Act included no effective administrative enforcement machinery. As a result, what Title VIII promised as national policy has never been matched by a program of meaningful Federal civil rights enforcement.

The weakness of Title VIII as a law is undisputed. Each HUD Secretary

since Carla Hills has called for legislation to strengthen the Fair Housing Act. More recently, President Reagan cited the failure of Title VIII as an enforcement tool and called on Congress to amend the Act.

S. 558 provides the opportunity to redeem the pledge of the Fair Housing Act by providing for a fair and effective program of enforcement and by extending the coverage of the Act to disabled Americans and to families with children. In my testimony today I will address both what Title VIII has failed to achieve for our citizens and discuss how S. 558 would vindicate the right of every American to receive equal, nondiscriminatory treatment in the housing marketplace.

The Fair Housing Act now provides three means of enforcement. HUD is authorized to investigate complaints of housing discrimination and to seek to resolve these through voluntary conciliation. In addition, the Justice Department may litigate violations involving a pattern and practice of discrimination. Finally, individual victims may file private lawsuits under Title VIII.

This approach to fair housing enforcement generally has been a failure because the average person with a straight forward, garden variety complaint of housing discrimination has not been able to receive basic justice when they have been victimized by unlawful practices. Victims who file complaints with HUD need prompt and credible investigative and enforcement actions so that they may gain occupancy of the home or apartment that they have been denied. Yet, Title VIII now promises neither speed nor effective protection.

HUD's own general counsel in testimony in 1985 to the Civil Rights Commission admitted that the lack of credible enforcement machinery within HUD meant that very few victims of housing discrimination were willing to rely on HUD for protection of their rights. The general counsel, John Knapp, stated that the annual average of 4,500 Title VIII complaints greatly underrepresented how serious a problem discrimination in housing continues to be. HUD's general counsel and other agency officials have estimated from statistical data and studies that between two and two and one-half million instances of housing discrimination occur annually in the Unites States.

While the impact of housing discrimination is harmful both to

individual victims and our society, HUD, the government's principal Title VIII enforcer, has nothing more to offer complainants than the possibility of a voluntary conciliation meeting with the discriminator if proof of unlawful conduct is found during HUD's investigation. But HUD is effectively powerless under Title VIII and both victims and respondents know it. Respondents who have violated the law need not even apologize to their victims. They can simply ignore HUD and refuse to engage in any form of conciliation proceedings. Under Title VIII no sanctions will follow.

None of these observations about Title VIII are new. Over the years, the Civil Rights Commission, the General Accounting Office, and a series of studies by private organizations have documented the enforcement weaknesses of HUD's powers under the Fair Housing Act. And, unfortunately litigation under Title VIII also has had far too limited an impact on discriminatory conduct.

It is obvious that litigation by the Department of Justice now offers little hope to most fair housing complainants. First, Title VIII does not authorize the Department of Justice to sue on behalf of the rights of individual victims. And, second, the Justice Department's staffing limitations and the delays of Federal court proceedings have always meant that discriminatory landlords do not have much to fear from the government. Even during the first ten years after Title VIII was passed, when fair housing litigation was more vigorously pursued, the Justice Department averaged only about 30 suits a year. This average dropped by about half in the late 1970s as Justice took on increasingly complex, high-impact fair housing cases. Finally, under the current Administration the annual average for Title VIII case filings since 1981 has fallen well below previous levels. It is obvious that the deterrent effect of Federal prosecution of Title VIII cases inevitably will be limited by Justice Department litigation resources and the congestion of the Federal court system.

In the end, victims of discrimination who are serious about gaining relief under the Fair Housing Act must be prepared to file their own private suit to vindicate their rights. In most cases, they will not obtain the housing they originally sought because of court delays. And, obviously, it

78-076 O - 86 - 4

is a home that the average person is seeking, not depositions, motions, and court proceedings. All of the complications of trial proceedings are simply too slow, costly, and intimidating for individuals and families who simply want fair treatment and to obtain a unit of housing.

It is for this reason that S. 558 is so important. This bill would establish a rational, tailored administrative enforcement process that would be speedy, create a credible deterrent, and that would mean that complainants and respondents alike would not be subjected to the costs and delays of the Federal court system.

Under S. 558 the HUD Secretary, for the first time, would be authorized to investigate and file complaints on his or her own initiative, moving HUD out of its current, passive law enforcement posture. HUD would continue to investigate complaints from aggrieved persons and under S. 558 could attempt to conciliate complaints during the investigative period. This could foster early resolution efforts that could gain for complainants the housing that had been denied by discriminatory practices. Of course, where investigative findings indicated no reasonable cause to believe discrimination had occurred, HUD would dismiss the complaint.

In those cases in which discrimination was verified by investigation, but conciliation could not be achieved, S. 558 provides for an administrative hearing process to resolve the matter. HUD would file a charge, based on the evidence from its investigation, and a hearing before an independent administrative law judge would follow. The administrative law judge would hear the case, decide the facts, and render a decision. Actual damages, punitive damages, or a cease and desist order would be authorized by S. 558 as remedial measures. HUD would represent the aggrieved person in the proceeding and each party could call, question, and cross examine witnesses. This would provide for a trial-type proceeding outside crowded court dockets and before law judges with expertise regarding housing discrimination and Title VIII. Basic due process concerns would be met in accordance with the requirements of the Administrative Procedure Act and the right of appeal to the Federal court of appeals. The use of such administrative enforcement procedures is longstanding and is utilized by 28 other Federal agencies.

With close congressional oversight and adequate budgetary support the administrative enforcement procedures of S. 558 will provide speedy, fair, and inexpensive decisions on complaints filed under the Fair Housing Act. HUD's authority and credibility would be substantially enhanced and, for the first time, conciliation between the parties would offer each side the mutual benefit of early dispute resolution.

Extension of Title VIII Coverage

S. 558 would extend the coverage of Title VIII to protect handicapped persons against housing discrimination and to make unlawful discrimination based on "familial status." The latter strengthening of the law is particularly important to the National Women's Political Caucus because of our concern regarding discrimination against families, many of which are headed by women who are already confronted by serious obstacles to their efforts to meet the needs of their households.

First, let me emphasize our strong support for the extension of Title VIII to disabled persons. This is needed and long overdue. Disabled persons often have limited incomes and find that their search for rental housing is blocked by architectural barriers and, in some cases, landlord prejudice and discrimination. S. 558 would tailor Title VIII protections to ensure that a disabled person would be treated fairly. Under S. 558 a landlord's unreasonable refusal to permit reasonable modifications of rental premises to provide for handicap accessibility would be unlawful. Accessibility modifications would be at the expense of the disabled person, not the owner. Adding protection of the handicapped to Title VIII would end discriminatory practices that now needlessly burden the housing search of the disabled.

Familial Status

With regard to the protection of familial status-- that is to say, families-- the National Women's Political Caucus believes there is no legitimate business reason to justify discriminating against families with children.

As a Nation, we cannot simultaneously champion the virtues of the family and yet turn our backs to the "adults only," "no children"

discrimination that increasingly limits the availability of rental units for households with offspring. Indeed, we as a society are failing if we accept a notion of daily life in which families and children can be excluded as undesirables.

The evidence is clear that discrimination against families is a serious problem in the housing marketplace. HUD commissioned several major studies in 1980 as the rental market grew tighter and found that "no children" policies badly hurt families by causing them to search for longer periods of time for their housing and pay higher costs for shelter of lower quality.

"No children" admission practices are not simply an ill that affects female-headed households, single-headed households, or minorities. Instead, the 73 percent of all American households in which children are present are all potential victims. A telling example, not hypothetical, is the married couple whose newborn child suddenly places them in violation of their landlord's "no children" restrictions. Other examples, obviously, would focus on families with a single head of household and with a limited income that forces them to rely on the rental market-- these families will be turned down repeatedly due to "no children" restrictions.

Nationwide studies by HUD found that more than 25 percent of all rental units studied were closed entirely to children and another 50 percent imposed restrictions that limited the age or number of children who could be admitted to residence. In some cities the level of exclusion was worse. For example, in California, prior to establishment of State protections, five major cities excluded children from at least half the local rental housing market. In one city, more than 70 percent of all rental housing was closed to children. And in Dallas, Texas another study found 85 percent of all newly-constructed rental housing excluded families with children.

As a rationale for exclusion of children, landlords have cited greater maintenance costs, noise, and higher expenses for utilities and insurance. Additionally, some renters are claimed to favor living circumstances in which no children are present. Whether one accepts these positions is a matter open to question, but it is clear to me that these do not appear to be sufficient justifications for denying the availability of millions of

units of housing to families who are seeking a home. The state interest in protecting the family is a fully adequate basis to establish antidiscrimination measures in the field of housing.

Several studies have focused on "no children" exclusionary practices and have concluded they actually may be used as a "smokescreen" for race or sex discrimination. When a landlord tells a black or Hispanic mother that he won't rent to her, but states that his refusal is because of her children, not her race or sex, he appears to act within the law. But for the victim, the effect of discriminatory denial is the same, regardless of its basis. Female-headed households, particularly those headed by minority women are most vulnerable to "no children" rental policies because their lower household incomes mean they are twice as likely to be renters. As a result, they are constantly exposed to actions that exclude families from housing.

Sixteen States, the District of Columbia, and numerous localities now have made unlawful discrimination in housing directed at families with children. In 1981 only nine states had adopted these laws. The growth in State and local protections reflects the increasing prevalence of the problem. Analysis by the Children's Defense Fund, the National Center for Youth Law, and other experts confirms discrimination against children is a widespread, national problem.

Mr. Chairman, it is time to establish a national anti-discrimination standard for the treatment of families seeking homes anywhere in the United States. Existing State and local statutes offer varying degrees of fair housing protection to families but none can offer the assurance of coverage for families moving across jurisdictional lines. It is important for Congress to provide leadership and a minimum level of fair housing protection for families as part of its effort to strengthen the overall effectiveness of Title VIII enforcement. S. 558 would provide a national standard (while carefully preserving local ordinance restrictions on the maximum occupancy of dwellings and exempting bona fide housing for the elderly).

Conclusion

In conclusion, Mr. Chairman, I believe S. 558 will mark a major step forward in efforts to secure and extend the principle of equal opportunity in housing to every American. Families and the disabled would receive needed new protection while those classes already covered by the Fair Housing Act would benefit from fair and effective administrative enforcement of Title VIII. Mr. Chairman, the Fair Housing Act of 1968 declared a national policy of "fair housing throughout the United States." S. 558 will help to make that overdue promise a reality.

Senator SIMON. Thank you.

Senator KENNEDY. Mr. Chairman.

Senator SIMON. Yes?

Senator KENNEDY. I have the pleasure of welcoming Marca Bristo, from the independent living program. I have been familiar with her work and the work of the program. It is really extraordinary. I have gotten to know more about it as a result of the work of my son with that program. So I want to welcome you here today and we look forward to your testimony.

Senator SIMON. And I would point out to the Senator from Massachusetts that she is from Illinois. We are very proud of her work.

Senator KENNEDY. I knew I had to get in there quickly. [Laughter.]

Senator SIMON. We are very pleased to have you here, Ms. Bristo.

STATEMENT OF MARCA BRISTO

Ms. BRISTO. Thank you, Mr. Chairman. My name is Marca Bristo and I am the president of Access Living, a non-residential center for independent living in Chicago, and also the president of the National Council on Independent Living.

Senator SIMON. Do you want to pull that microphone just a little closer to you?

Ms. BRISTO. I do not know if it will come closer. Our table is not quite accessible. [Laughter.]

The written testimony which I have submitted contains an error in the title of the National Council on Independent Living.

I am here today on behalf of 40 national disability organizations representing 36 million Americans who have disabilities. The landmark legislation we address today is a long overdue affirmation of a very basic right, access to housing.

Historically, there has been primarily one housing option to people with disabilities, institutionalization. Housing is a fundamental requirement for living independently. An acute lack of housing opportunities for persons with disabilities in this country severely impedes our efforts to integrate into society and become independent and productive citizens.

In 1977, I sustained a spinal cord injury from a diving accident in Lake Michigan. That event remarkably and suddenly changed my life. I was a patient in Chicago in rehabilitation, and at the time I was living in an inaccessible environment so I knew I was going to have to move when I left the hospital.

However, I was not prepared to deal with the attitude of discrimination that I faced when I got out of the hospital. I had friends who took me from apartment to apartment to apartment. Four, in total, refused to even show me the apartments.

The remarks that I got, though not verbatim, were things like "we have had people in wheelchairs here before and they could not get in, so I think it would be a waste of both of our time to show you the unit."

Finally, I got fed up and I insisted that one of the landlords show me the apartment anyway and, sure enough, once I was able to get

upstairs in the building and actually look around, there were very minor modifications that needed to be made and I live there now.

I would like to point out that I think disabled people make very good tenants because of the shortage of housing for us; once we get in there, it is precious to us and we tend to need to keep it.

Although I have a physical disability, I am here today speaking on behalf of people with all disabilities. We share the common experience of discrimination which is constantly played out in many different scenarios.

Consider, for example, the woman who was deaf and was not even allowed to complete an application for an apartment because the rental agents assumed she was not competent—Marlee Matlin proved that differently last night—the young man with mild mental retardation here in D.C. who was told there were no units left after he was observed getting assistance in reading his application. His previous rental history was impeccable and his income was more than sufficient; the family with a child severely disabled as a result of an accident, forced to leave their rent-controlled apartment when some minor modifications to the bathroom were disallowed, the increased rents they paid for their new setting exacerbated the already serious financial problems which they faced in meeting their daughter's care costs; the young woman, head injured as a result of an accident whose communication difficulties led the apartment manager to reject her application on the grounds that she was too disabled to live by herself; and the man who uses attendant care and is barred from renting an apartment because the landlord assumed that the applicant was unable to live independently, just because he needed an attendant to meet his personal care needs.

All these people want is the ability to live in their communities. The discrimination we face comes from society's misconceptions about disability, misconceptions which are based on ignorance and prejudice. Such prejudice has resulted in more than 120,000 people with mental retardation unnecessarily and expensively institutionalized; half a million individuals who have chronic mental illness who are homeless, and approximately 200,000 must call psychiatric institutions their home; and, finally, more than 20 million people with physical disabilities who find themselves excluded from most private housing.

Too many unnecessarily fill the beds in the only accessible "house" in town, the nursing home. In Cook County, Senator Simon, there are over 10,000 non-elderly disabled people living in nursing homes.

The Fair Housing Act, as written, will alleviate the first and most egregious obstacle to housing for people with disabilities. By prohibiting denial of access to housing on the basis of handicapping condition, the bill will get us beyond the prejudice and unfounded fears of landlords, owners, and communities at-large.

The bill will assure that landlords will not be able to use as a pretext for denying housing to an individual the fact that the person has difficulty communicating, seeing, hearing, or walking.

The bill also assures that it will be discrimination for tenants to be disallowed the opportunity to make reasonable modifications. This provision paves the way for necessary alterations to assure

access, at least for those tenants who can afford to pay for such modifications. In any case, it is important to establish clear congressional intent regarding this provision, such that:

One: To the extent that a tenant may have to assume any costs for modifications, those costs should be limited to the premises or dwelling unit actually occupied by the tenant and should not be interpreted to include necessary modifications to space shared in common with other tenants.

Two: Nothing in this section may be read to restrict the ability of landlords and tenants to negotiate arrangements for payments for modifications or to access outside resources for such payments. In addition, this section must not function as a deterrent for the current and growing practice to incorporate retrofit programs into funding priorities under various public and private local, State, and Federal housing and social service programs.

We applaud the efforts of this committee in addressing the basic housing problems facing Americans with disabilities. However, for all of those who may argue that even this bill goes too far, let me say that until congress takes a position that all new construction meet universal design standards, people with physical disabilities will continue to be ostracized from society.

Universal design standards are no-cost, front-end specifications for new construction which can substantially improve access for those who are born with disabilities, who experience transient disabling conditions, who become disabled from accident or illness, and who age into disability. The way I figure it, that is about everybody in this room.

Finally, I want to address the needs of people with disabilities who live in group homes. These individuals must be clearly guaranteed protections under this bill. We affirm the right of States and local jurisdictions to set necessary standards for the operation of such homes.

However, historical experience in the development of these standards has resulted in de facto segregation of people with disabilities. We urge, therefore, continuing congressional review of this issue.

I certainly hope that the disabled community has your full support in seeing that for the first time our rights as citizens of this country are protected in the area of housing.

Thank you.

[Prepared statement follows:]

TESTIMONY PRESENTED BY

MARCA BRISTO

NATIONAL CENTERS ON INDEPENDENT LIVING

ON BEHALF OF:

National Association of Rehabilitation Professionals in the Private Sector
National Association of State Mental Retardation Program Directors
Association for the Education of Rehabilitation Facility Personnel
Association for Children and Adults with Learning Disabilities
National Association of Developmental Disabilities Councils
Conference of Educational Administrators Serving the Deaf
National Association of Protection and Advocacy Systems
Association for Retarded Citizens of the United States
National Association of Private Residential Facilities
for the Mentally Retarded
National Association of Rehabilitation Facilities
The Association for Persons with Severe Handicaps
American Deafness and Rehabilitation Association
International Association of Parents of the Deaf
Convention of American Instructors of the Deaf
Alexander Graham Bell Association of the Deaf
American Speech-Language-Hearing Association
Disability Rights Education and Defense Fund
National Council on Rehabilitation Education
Registry of Interpreters for the Deaf, Inc.
American Association on Mental Deficiency
American Occupational Therapy Association
United Cerebral Palsy Associations, Inc.
National Spinal Cord Injury Association
National Alliance for the Mentally Ill
American Association of the Deaf-Blind
National Fraternal Society of the Deaf
National Center on Independent Living
American Physical Therapy Association
National Center for Law and the Deaf
National Rehabilitation Association
National Mental Health Association
Council for Exceptional Children
Center for Law and Social Policy
National Association of the Deaf
National Head Injury Foundation
Child Welfare League of America
National Down Syndrome Congress
Epilepsy Foundation of America
Goodwill Industries of America
National Education Association
Paralyzed Veterans of America
American Council of the Blind
World Institute on Disability
Mental Health Law Project
Disability Rights Center

Mr. Chairman, my name is Marca Bristo. I am the president of Access Living, a Center for Independent Living in Chicago, president of the National Centers on Independent Living (NCIL). I am here today on behalf of 40 national disability organizations representing the 36 million Americans who have disabilities. The landmark legislation we address today is a long overdue affirmation of a very basic right... access to housing. Historically, there has been primarily one housing option available to people with disabilities - institutionalization. Housing is a fundamental requirement for living independently. An acute lack of housing opportunities for persons with disabilities in this country severely impedes our efforts to integrate into society and become independent, productive citizens.

Although I have a physical disability, I am here today speaking on behalf of people with all disabilities. We share the common experience of discrimination which is constantly played out in many different scenarios. Consider, for example:

- the woman who is deaf and was not even allowed to complete an application for an apartment because the rental agents assumed she was not competent;
- the young man with mild mental retardation here in DC who was told there were no units left after he was observed getting assistance in reading his application. His previous rental history was impeccable and his income was more than sufficient. The units were re-advertised the following weekend.
- the family with a child severely disabled as a result of an accident forced to leave their rent-controlled apartment when some minor modifications

to the bathroom were disallowed. The increased rents they paid for their new setting exacerbated the already serious financial problems which they faced in meeting their daughter's care costs.

- the young woman, head-injured as a result of an accident, whose communication difficulties lead the apartment manager to reject her application on the grounds that she is too disabled to live by herself;
- the man who uses attendant care and is barred from renting an apartment because the landlord assumed that the applicant was unable to live independently just because he needs an attendant to meet personal care needs.

All these people want is the ability to live in their communities. The discrimination we face comes from society's misconceptions about disability - misconceptions which are based on ignorance and prejudice. Such prejudice has resulted in

- more than 120,000 people with mental retardation unnecessarily and expensively institutionalized;
- a half million individuals who have chronic mental illness who are homeless, and approximately 200,000 who must call psychiatric institutions their home; and
- finally, more than 20 million people with physical disabilities who find themselves excluded from most private housing. Too many unneccessarily fill the beds in the only accessible housing in town - the nursing home. In fact in Cook County, Illinois alone over 10,000 non-elderly disabled people live in nursing homes.

The Fair Housing Act as written will alleviate the first

and most egregious obstacle to housing for people with disabilities. By prohibiting denial of access to housing on the basis of "handicapping condition", the bill will get us beyond the prejudice and unfounded fears of landlords, owners, and communities at large. The bill will assure that landlords will not be able to use as a pretext for denying housing to an individual the fact that the person has difficulty communicating, hearing , seeing, or walking.

The bill also assures that it will be discrimination for tenants to be disallowed the opportunity to make reasonable modifications. This provision paves the way for necessary alterations to assure access, at least for those tenants who can afford to pay for such modifications. In any case,it is important to establish clear Congressional intent regarding this provision such that:

1) To the extent that a tenant may have to assume any costs for modifications, those costs should be limited to the premises or dwelling unit actually occupied by the tenant and should not be interpreted to include necessary modifications to space shared in common with other tenants.

2) Nothing in this section may be read to restrict the ability of landlords and tenants to negotiate arrangements for payments for modifications or to access outside resources for such payments. In addition, this section must not function as a deterrant for the current and growing practice to incorporate retrofit programs into funding priorities under various public and private local, state, and federal housing and social service programs.

We applaud the efforts of this Committee in addressing the basic housing problems facing Americans with disabilities. However, for all of those who may argue that even this bill has already gone too far, let may say that until Congress takes the position that all new construction meet universal design standards, people with physical disabilities will continue to be ostracized from society. Universal design standards are no-cost front-end specifications for new construction which can substantially improve access for those who are born with disabilities, who experience transient disabling conditions, who become disabled through accident or illness, and who age into disability.

Finally, I want to address the needs of people with disabilities who live in group homes. These individuals must be clearly guaranteed protections under this bill. We affirm the rights of states and local jurisdictions to set necessary standards for the operation of such homes. However, the historical experience in the deveolpment of these standards has resulted in de facto segregation of people with disabilities. We urge continuing Congressional review of this issue to assure that people living in group home settings will be adequately protected.

Congress has played a major role in obtaining basic civil rights protections for people with disabilities... the right to education...the right to employment... the right to adequate health care. It is now time for Congress to act to assure that this most basic right - the right to live independently in society - is secured for all Americans with disabilities. We look forward to working with you to guarantee the passage of fair housing legislation during this Congress.

Senator SIMON. We thank all of you. Unfortunately, I am going to have to leave in a minute or two and I am going to turn the chair over to Senator Kennedy. We are marking up the budget upstairs and I have to be there.

I appreciate your testimony. If I can just use one illustration of why it is important, as Ms. Bristo just mentioned, I had a person who worked for me, Marilyn McAdams. You may know her. Marilyn worked for me in southern Illinois and we brought her to Washington to work for me.

I was aware that people in wheelchairs face problems getting a place, first of all, because a lot of places are just not accessible to someone in a wheelchair.

But to run into this blatant discrimination is just unconscionable. The rest of you have gone through similar kinds of experiences. We can do much better in our society and if this subcommittee has anything to say about it, we are going to do much better in our society.

We thank you very, very much, and I thank my colleagues for continuing this hearing.

Senator KENNEDY [presiding]. I have some questions. I will recognize Senator Specter and then we will come back.

Senator SPECTER. Thank you, Senator Kennedy.

A question has arisen as to establishing the class of families with children as to whether the need really exists. You heard Secretary Pierce testify that there is opposition to this facet of the legislation; that some consider it a problem for local and State government. So I think we had better muster the evidence which will support this category as one of major need.

Mr. Yzaguirre, what is the extent numerically, as best you know, to discrimination of families with children? How widespread a problem is it?

Mr. YZAGUIRRE. We think it is very extensive. The facts speak for themselves. We have larger families. It is not only an Hispanic issue, obviously; it is an issue across society. It affects certain populations disproportionately, the poor and certain other population groups.

Let me just say, Senator, that——

Senator SPECTER. Before you proceed, when you say the facts speak for themselves, they do once they are established, but I think we had better put in order the details, and I would appreciate it if you could provide as much specific information as possible on the Hispanic community as to the total number of Hispanics who seek housing, your best estimates, whatever statistical evidence is available on those who are discriminated against, because we are going to have be very precise, I think, to carry the day here on an evidentiary basis.

Mr. YZAGUIRRE. We will be delighted to offer that testimony. As I understand the legislation, however, Senator, nothing in the legislation does away with requirements in terms of overcrowding; that is, you know, the number of occupants per bedroom, and so forth, would be a normal and legal situation.

Senator SPECTER. Well, I think that is so, but I think we have to get a handle on how many families with children are discriminated

against, how widespread a problem it is, to show that there is a real need to attack it on the national level.

Ms. Natividad, would you care to comment on that? How good is our evidence on this point?

Ms. NATIVIDAD. I think part of the problem is the absence of data because this is a new phenomenon that is just beginning to be tracked. One of the reasons why I quoted numbers having to do with the percentage of rental housing that is restricted to children is because that is an indirect way of trying to get at that kind of evidence.

There are not, as Mr. Yzaguirre mentioned before, many families who will undergo litigation just to prove that discrimination has taken place. There have been some cases that are illustrative cases, as opposed to actually giving you numbers, *x* percentage of families who were denied housing.

Instead, what we can point to is the increase in the numbers of rental housing that have become restricted to children.

Senator SPECTER. Well, that would be useful.

Ms. NATIVIDAD. Well, I mentioned that in my testimony. It has gone up from 17 percent in 1974 to 26 percent in 1981. That is a lot; that is a quarter of all housing totally closed to children.

Senator SPECTER. What studies have shown that, Ms. Natividad?

Ms. NATIVIDAD. HUD itself commissioned that study. In addition to that, 50 percent of rental housing is restricted to certain ages of children and the number of children. So you are talking about a total of 76 percent of rental housing in the United States that has restrictive policies regarding families with children.

What is interesting in that same HUD study is that two-bedroom apartments tend to be far more restrictive than, say, one-bedroom or studios. It is incredible.

Senator SPECTER. It is not as restrictive when nobody would want it.

Ms. NATIVIDAD. Right. The more costly the apartment, the more likely that there will be a restrictive policy.

Senator SPECTER. Ms. Simmons, the point has been raised by Secretary Pierce and others that the family classification ought not to be pressed now because it is going to dissipate our efforts on discrimination on a racial basis.

Speaking for the NAACP, how would you evaluate that? Do you think we ought to make these two fights together or is there anything to the proposition that there ought to be a backing off of the family discriminatory class in order to be sure that discrimination on a racial basis is pressed now?

Ms. SIMMONS. Senator, I think that discrimination is discrimination is discrimination. I do not think we ought to separate it out. I think we want to deal with race and families together.

Senator SPECTER. I thought you would say that. You are not prepared to make any concessions as to one for the other, are you?

Ms. SIMMONS. No, I am not.

Senator SPECTER. Well, frankly, neither am I, but I think we are going to have to really get the facts organized here.

Just one other question. The redlining on mortgages and insurance, I agree with you, is a tremendous problem, but are you sug-

gesting that we ought to broaden this legislation to handle that issue?

Ms. SIMMONS. I had to bring that up, Senator, because I think it is a severe problem. I think that possibly when the law was considered in 1968 that it was an oversight. I also must say to you that I want this legislation passed this year. I do not want to do anything that is going to hamper the passage of this measure.

Senator SPECTER. You might make a slight concession on redlining for the present time?

Ms. SIMMONS. Yes.

Senator SPECTER. OK. It is not too often that you make any concessions, Ms. Simmons.

Ms. SIMMONS. That is true. [Laughter.]

Senator SPECTER. I do not either, so I am in agreement with you, but I think the redlining does bring up a whole new dimension which I think is a serious problem, but it would have to involve a whole evidentiary base and a whole line of consideration which would a major, major dimension to be considered.

Ms. SIMMONS. Well, I would be in favor, Senator, of getting this measure passed that we have before us now. Then I do not mind coming back to the well at another time.

Senator SPECTER. OK, fine.

Ms. Bristo, I think you have made your case. I think as to the issue on the handicapped that we have general agreement, and I think that we are going to get somewhere on it so I do not have any question to put to you.

Thank you very much.

Senator KENNEDY. Thank you very much.

I think, Ms. Natividad, one of the phenomena we have seen in more recent times is the single-parent households with children as well. I mean, there is a very definite demographic movement in that direction. We see it all across our country.

I thought that your testimony was very compelling with regard to rental units, and I thought the point that was useful to underline was that most of the newer kinds of housing units, more and more of those have these kinds of restrictions. So we have got a problem.

We are on notice on this, and just by its nature and description it is a matter of urgency. I find that that case has been powerfully made not only by your own analysis, but by the other kinds of HUD studies.

Let me ask, Althea, on the whole issue of the administrative judge process versus arbitration, I would like to give you a chance to address that issue so we have a very clear understanding as to your position on it. I think we know what it is, clearly, from Dr. Benjamin Hooks' testimony and your own statement.

But you believe that the establishment of the administrative judge procedure is the way to go?

Ms. SIMMONS. I certainly do, Senator.

Senator KENNEDY. And you do not see a problem resulting from dividing up the prosecutorial and the adjudicative process with that kind of a procedure? You do not see a problem?

Ms. SIMMONS. I do not because I think that the Administrative Procedure Act takes care of that.

Senator KENNEDY. And that certainly has been the case in the times that administrative judges have been used in other agencies. That has been certainly worked out in a satisfactory way, and you think the wealth knowledge developed in that experience would serve us well to follow in this legislation?

Ms. SIMMONS. I certainly do because we have found out that in school desegregation cases and other cases, and even just as recently as the latest legislation on immigration, we have the use of ALJs. We certainly support that wholeheartedly.

Senator KENNEDY. You, I think, have underlined again, and I think all of you have, the fact that we have got a significant problem out there and there just really is not the remedy for it, and it is ongoing and it is continuing.

It is really affecting not only housing, which in and of itself is bad enough, but it is impacting our communities and neighborhoods. This is something that I think has to be underlined.

Althea, you have got a number of branches all across the country. Could you tell us a little bit about the most egregious kinds of situations that get reported to you? Could you maybe illustrate those just briefly for us?

Ms. SIMMONS. Yes. Some of our branches report that when blacks go for housing, the housing is there when they use the telephone. Once they get there, they see they are black and the housing is no longer available.

Let us say if they go down for a loan commitment, they can get an 80-percent loan commitment if they are going into a traditional black neighborhood. If they want to go into a non-traditional neighborhood, the loan commitment is less, which means they cannot afford to get into that neighborhood.

In addition to that, they found out that when they actually go and try and get housing, they are told that if they have children that they do not want children in the neighborhood or your families are too large, and that is going to lower the property values.

So these are the kinds of things reported from Louisiana to California to Colorado. We have talked with persons in about 15 States just in the past 8 or 10 days and the problems are being exacerbated.

Senator KENNEDY. Secretary Pierce indicated HUD is getting some 2 million complaints a year, 2 million. These are the kinds of complaints, I imagine, that he is referring to, the kinds of complaints that you are hearing about daily, is that correct?

Ms. SIMMONS. That is correct, and I must say, Senator, I have experienced some of that myself personally.

Senator KENNEDY. Mr. Yzaguirre, are these types of experiences that Althea Simmons has commented on—are these types of situations replicated within the Hispanic community as well?

Mr. YZAGUIRRE. Senator, I am embarrassed as an American to report to you that it has occurred within our own staff in the metropolitan area as recently as this year. It is pervasive. It takes many forms; we have talked about them in some detail.

It has to do with steering you to a different location, offering you less of what you want, higher rents or higher deposits. It can be subtle and it can be very blatant, but it is very pervasive.

Senator KENNEDY. Ms. Natividad, I think you made the case with regard to what is happening with both women and the other groups in our society, and particularly with children. Do you find that landlords are playing these kinds of games as well?

Ms. NATIVIDAD. Oh, sure.

Senator KENNEDY. What are some of the other kinds of devices that are used to discriminate against families and against children?

Ms. NATIVIDAD. Well, it is very easy to discriminate especially with female-headed households, which you correctly pointed out are on the rise. These families tend to be of lower income, and because the income is so low they are much more likely to be renters than homeowners.

When they come with a child and they have a low-income rating, then it is much more likely that discrimination is blatant, and you can use children, you can use race, you can use sex. There are layers upon layers upon layers of discrimination being experienced by a population that is growing because of increasing divorce rates and out-of-wedlock marriages.

I want to focus on that 12.5 million children who live in such households who have become migrants as they continually search for homes. It is like a vicious cycle and I frankly do not see the end because what I see are a lot more female-headed household in a tighter rental market.

As you well know, the amount of rental residences being built lately has become reduced. So given that kind of situation, I do not see any relief unless we have such a bill.

Senator Kennedy. We all see the television programs and read the stories about people living in cars and the homeless problem. Do you think some of that is attributed to this kind of discrimination as well?

Ms. NATIVIDAD. Oh, surely, very easily.

Senator KENNEDY. There is quite a desire to try and deal with the homeless issue, but I think that you are putting your finger on something that has contributed to that problem as well, and it is this type of discrimination.

Ms. Bristo, how do you respond to, I suppose, some who will see, well, if this passes, are we as landlords going to be required to rehab every apartment in town in order not to get sued by the Federal Government for discriminating against those that have physical disabilities?

I am sure we will hear that. What is the best way for us to answer that?

Ms. BRISTO. I suppose the first thing, pragmatically, is that when I go shopping for an apartment, personally, I do not seek out those that are going to be the most difficult for me in the first place. So logic dictates that most disabled people are going to be looking at places that, if they need any modification, it is probably going to be extremely minimal.

I would also like to emphasize that our focus has been to look to Congress for strengthening provisions around new construction. We feel if those kinds of changes were made, doors would be open to vast numbers of people who right now are simply closed out because, for example, the bathroom doorway is too narrow. A simple change as that—in universal design concept—would open the door

to many, many, many opportunities, and then you could say we would not be in a position to have to really deal with retrofit or rehab.

Senator KENNEDY. Very good. Well, I think that is an excellent comment.

There are no further questions. If we could, we might submit some questions to you from other members, if they so desire. I want to thank all of you very, very much for you very, very helpful testimony.

Senator SPECTER. Senator, I would like to add on the question that I talked to Ms. Simmons about that there are provisions under current law to prevent banks from discriminating, and this bill would make it clear that insurance companies cannot discriminate.

We have not taken up what is called the secondary insurance or mortgage because the mortgage companies and insurance companies then go back to other companies and we do not deal with that here or with the redlining, those kinds of sophisticated issues.

But I think that we will have to allow that to remain for another day. Thank you.

Senator KENNEDY. Thank you very much.

We have a final panel: Mr. Robert Butters, National Association of Realtors; and Rodney Smolla, who is a professor of law at the University of Arkansas.

Mr. Butters, you are, as I understand it, the counsel for the National Association of Realtors?

Mr. BUTTERS. Associate counsel for the National Association of Realtors, Senator.

Senator KENNEDY. Associate counsel; very good. We will start off with your testimony.

A PANEL CONSISTING OF ROBERT BUTTERS, ASSOCIATE COUNSEL, NATIONAL ASSOCIATION OF REALTORS; AND RODNEY A. SMOLLA, PROFESSOR OF LAW, UNIVERSITY OF ARKANSAS

Mr. BUTTERS. Senator Kennedy, distinguished members of the subcommittee, I am Robert Butters, associate counsel of the National Association of Realtors. On behalf of the 750,000 members of NAR, we greatly appreciate this opportunity to appear and testify before this subcommittee on what we believe to be a very significant opportunity for the resolution, and hopefully the ultimate resolution, of the problem of housing discrimination in America.

As this subcommittee knows, amendments have been proposed to the Fair Housing Act in almost every session of Congress since 1978. The National Association has presented its views on these amendments repeatedly and consistently.

We strongly favor vigorous enforcement of equal housing opportunity for all Americans, and the National Association expends considerable resources each year in an attempt to ensure that NAR members comply with the existing Fair Housing Act.

We also firmly believe that any effort to amend the Fair Housing Act, and particularly for increasing the penalties for violating the Act, should occur only after the purpose of the Fair Housing Act is clarified concerning whether the law mandates equal housing op-

portunity or the creation and maintenance of integrated housing patterns.

We are committed to working with Congress to improve fair housing enforcement once this foundation of the law has been clarified. As an example of this commitment, I would refer this subcommittee to recent developments in the Senate Banking Committee where the Housing Subcommittee Chairman, Senator Cranston, praised NAR's constructive efforts to resolve a longstanding controversy over whether Federal funds should be granted without restriction to private fair housing groups to engage in testing of real estate brokers.

The Senate Banking Committee recently adopted, with NAR support, a 2-year pilot program in which Federal funds would be provided to private fair housing organizations, subject to guidelines promulgated by the HUD Secretary, that were developed by HUD in collaboration with NAR.

These guidelines govern eligibility for Federal funding and the manner in which these funded tests will be conducted. We understand that the bill containing this program is currently on the Senate floor and is expected to pass before the day is out. We expect equally prompt and favorable action in the House.

Turning to NAR's concerns with the legislation before this subcommittee, we strongly support provisions in the bill introduced by Senator Hatch that clarify the purpose of the fair housing law as ensuring equal housing opportunity and expressly stating that the law does not require the achievement of any particular proportion of minorities to majorities within any housing development, neighborhood or community.

We submit that this clarification is essential because it is unfair to impose effective commercial capital punishment on a real estate broker for violating a law that does not provide clear and specific standards concerning what conduct is permitted and what conduct is proscribed.

We have seen over the last 20 years that despite what Congress may have intended in 1968, open housing does not necessarily result in integrated housing patterns. Because of this, municipalities, and in some instances State governments and even the Federal Government, have encouraged or required marketers of housing to adopt specific, race-conscious marketing practices to achieve some demographic goal or quota so as to maintain or preserve integrated housing patterns. Specific examples are described in my prepared statement, which include a program operated by the State of Ohio in 1985.

Real estate brokers must be rescued from this conflict concerning the meaning of fair housing, which the 1968 Act specifically does not define. Brokers must be told if racial steering to maintain integrated neighborhoods is lawful. If it is lawful, brokers must be told when a community is sufficiently integrated to trigger integration maintenance techniques to preserve that balance.

Brokers must be told who has authority to make that judgment. Is it a municipality, a State, the Federal Government, or a private fair housing group operating on its own or at a city's behest?

We submit that it is only fair that if a person is to be effectively put out of business if he violates the law, the law should clearly

and specifically inform him of what conduct will cause this result and what conduct will afford him a safe harbor.

We also support the provision contained in Senator Hatch's bill that defines an aggrieved person under the act as one whose bona fide attempt to purchase, sell or lease real estate has been frustrated by a discriminatory housing practice.

We submit that Congress never contemplated in 1968 that persons other than bona fide housing seekers would be entitled to sue under the act. We have seen the studies such as the one cited by Secretary Pierce based upon criteria that defined discrimination as including such differences as whether a broker offered a home seeker a cup of coffee.

We believe that a limitation on standing to a bona fide home seeker is absolutely essential before any consideration is given to increasing the sanctions on a person who violates the act. Otherwise, a broker can be put out of business upon a single charge brought by a person who suffered no actual injury.

We also believe that the best way to achieve the efficient and effective enforcement of the Fair Housing Act is to strengthen the conciliation process currently available under Section 810. The Hatch bill does that; the Kennedy-Specter bill does not.

The Hatch bill strengthens conciliation by authorizing an award of $1,000 in attorney's fees to a complainant if a respondent refuses to conciliate. It also mandates that the conciliation will remain confidential, which we believe is essential to its success.

The Kennedy-Specter bill, on the other hand, requires that conciliation agreements be made public, approved by the HUD Secretary, and referred to the Attorney General if a respondent enters into more than one agreement in a 5-year period. These provisions each act affirmatively to discourage a respondent's conciliation and encourage him, instead, to seek to prove his innocence at all cost.

The NAR once more opposes enforcement of the act through a system of HUD-controlled administrative law judges, as has again been proposed in the Kennedy-Specter bill. We believe this system is constitutionally suspect because it denies a respondent a right to a trial by jury on a claim for damages under the act.

The ALJ system also confers on non-Article III tribunals the adjudication of what are actually private disputes between two individuals over whether a housing opportunity was made unavailable by illegal housing discrimination.

Beyond its constitutional infirmities, we believe the ALJ system is also unnecessary and duplicative and has not necessarily been proven to be more efficient than Federal courts or the vast array of remedies available under the large number of State and local fair housing enforcement schemes that the HUD Secretary has already deemed substantially equivalent to title VIII.

Indeed, when the 1980 amendments to the Fair Housing Act were debated on the Senate floor, Senator Kennedy did accept a proposal from Senator DeConcini that would have placed enforcement in the hands of Federal magistrates rather than HUD ALJs.

We submit that this action by Senator Kennedy strongly suggests that responsible alternatives to HUD ALJs certainly exist to achieve the efficient and effective enforcement of the Fair Housing Act.

Concerning prohibiting discrimination against handicapped persons, we wholeheartedly endorse the adding of this category of discrimination to the act, provided that it is clearly defined, as it is in the Hatch bill, to include such traditional handicaps as blindness, deafness, inability to walk unaided or live unattended.

We also believe that it is reasonable that a tenant assume the costs of modifying a unit to accommodate the tenant's handicap, as well as the cost of restoring the unit to its prior condition.

Senator KENNEDY. Your time is gone, so we will give you a couple of more minutes to wind up.

Mr. BUTTERS. Thank you. I am almost finished.

We also support amendments to the Fair Housing Act that maximize housing opportunities for families with children, provided that the rights of elderly and retirement age persons are recognized.

We also believe that landlords and developments should have the prerogative to assign areas within a development as appropriate for families with children and other areas as appropriate for families without children or single adults, so as to maximize the enjoyment of the development for all residents.

The National Association appreciates this opportunity to present its views to the subcommittee on a matter so vital to the real estate industry and the nation as a whole.

Thank you.

[Prepared statement follows:]

PREPARED STATEMENT OF ROBERT BUTTERS
ON BEHALF OF THE NATIONAL ASSOCIATION OF REALTORS

Mr. Chairman, my name is Robert Butters, and I am from Chicago, Illinois. I am an Associate Counsel for the NATIONAL ASSOCIATION OF REALTORS®. (NAR) I have served the National Association as an attorney for over eight years. For two of those years, I was affiliated with a private Chicago law firm, and for the last six years I have served in the Association's Legal Affairs Division.

The NATIONAL ASSOCIATION OF REALTORS® is a professional association of over 750,000 men and women engaged in every aspect of the real estate business and its related branches. The members of the National Association are deeply grateful for the opportunity to testify before this Subcommittee concerning one of the most critical issues facing the real estate industry; namely, the scope and purpose of the federal Fair Housing Laws, and the manner in which they are to be enforced.

To be sure, the NATIONAL ASSOCIATION OF REALTORS® has testified on these matters before this Subcommittee and its counterpart in the House many times in the past. Our views on the basic issues presented by the current proposed amendments to the Fair Housing Act are essentially the same today as they have been since 1979.

We submit that before any other amendments to the Fair Housing Act are considered, the Congress must first come to grips with the total absence of any definition in the current law concerning what is meant by "fair housing." Does it mean equal housing opportunity with no legal significance attaching to the demographic consequences of housing "freedom of choice"? Or does "fair housing" impose affirmative obligations on the marketers of real estate --

primarily real estate brokers and sales people--to tailor their sales practices, to create and maintain "stable, integrated housing patterns"? We contend the answers to these two questions cannot be both "yes" at the same time.

We also submit that until this fundamental conflict in the objective of the law is resolved it is wholly inappropriate to: (1) increase significantly the penalties for a violation of the Act; (2) permit suits to be brought by persons who have not actually had housing made "otherwise unavailable" to them by reason of a discriminatory housing practice; or (3) add a duplicative and constitutionally suspect Administrative hearing to the forums in which a person alleged to have violated the Act must respond.

Having said that, this Subcommittee should also understand that the National Association is firmly committed to working with you to achieve a resolution of the issues that have divided us over the last eight years. We believe our objective is common: creating a fair and equitable process to ensure the right of every American to rent or purchase real estate unfettered by discrimination based upon race, religion, creed, color, sex or any other prohibited criteria. We believe we already have made great strides in the 100th Congress in reaching mutually acceptable compromises on fair housing matters. In this regard, I would call this Subcommittee's particular attention to recent actions of the Senate Banking Committee.

For a period of nearly two years, the National Association had opposed the concept in HUD's proposed Fair Housing Initiative Program (FHIP) that would federally fund the use of "testers" by private fair housing organizations to measure real estate broker's compliance with the Fair Housing Laws, and to initiate litigation should a broker "fail" the test. In our view unrestricted federal funding of testing by private organizations is fundamentally unfair because: (1) the Fair Housing Act does not clearly define what conduct is permitted or proscribed; (2) private organizations are not subject to the due

process and equal protection requirements of the 5th and 14th Amendments; (3) and the testing process itself is imprecise and susceptible to abuse if not properly measured.

At the behest of the Congress, NAR and HUD met in 1986 to resolve the FHIP impasse. The result, after fair compromises on both sides, was a NAR/HUD agreement concerning certain Guidelines that will govern eligibility for FHIP funding, and the manner in which the tests funded by FHIP will be conducted. More recently, NAR worked with the Senate Banking Committee and HUD and reached a compromise on a two year pilot program in which FHIP monies will be made available to private organizations for testing purposes subject to the Guidelines that the Secretary of HUD will promulgate. After two years, the program will be reviewed to determine whether it will be reauthorized as is, modified or abandoned.

This resolution of the FHIP controversy was recently adopted by the Senate Banking Committee. A similar proposal is before the House Banking Committee. We anticipate favorable action by both Houses in the near future. The manner in which the FHIP controversy was resolved moved Senator Cranston, who Chairs the Housing Subcommittee, to enter a statement in the Banking Committee record praising NAR's constructive approach to the FHIP issue.

We submit that the difficult issues before this Subcommittee are also capable of resolution through the same process of fair and honest compromise that solved the FHIP controversy. NAR can and will meet our opponents "half way." We will even go "the extra mile." But as this Subcommittee well knows, compromise and negotiation are two way streets. There should be accommodation and flexibility on both sides of the table.

Indeed, the FHIP issue is not only the example of NAR negotiation and compromise on fair housing matters. It is only the most recent. In 1976, NAR and HUD negotiated the first industry-wide Voluntary Affirmative Marketing Agreement (VAMA). The NAR/HUD VAMA committed NAR and its signatory members to

clearly define what conduct is permitted, and what conduct is prohibited. Suffice to say that the confusion which exists concerning what the Fair Housing Laws require is in large measure the result of the disagreement over Fair Housing objectives.

This disagreement over objectives can be rather simply described, in spite of its vast complexity. It is a disagreement between those who understand the Fair Housing Laws as mandating "free housing choice" and "open housing," and those who understand those Laws as mandating an "integrated society." The Fair Housing Act, itself, provides no resolution of this disagreement since "Fair Housing", which is the stated objective of Title VIII, is not defined. Nor has the Supreme Court provided a definition of "Fair Housing" which would put the disagreement to rest.

Nor is the legislative history of Title VIII helpful in reconciling this disagreement. While the Act's principal sponsor said it was intended "to replace the ghettos with truly integrated and balanced living patterns,"[1] he also identified as the basic purpose of the legislation "to permit people who have the ability to do so to buy any house offered to the public if they can afford to buy it."[2]

Nor is the disagreement as to the meaning of Fair Housing clarified by the comments of another co-sponsor of Title VIII when he said on the one hand:

> "America's future must lie in the successful integration of all our many minorities, or there can be no future worthy of America."[3]

and on the other hand:

> "That future does not require imposed residential and social integration...it does require that government protect the freedom of individuals to choose where they wish to live."[4]

The fact of the matter is that the disagreement that now exists over the

---

1. 114 Congressional Record 3422.
2. 114 Congressional Record 3421.
3. 114 Congressional Record 2525.
4. Id.

affirmative steps to make minority citizens full participants in the American homebuying market, and to insure that all persons doing business with a REALTOR® are accorded equal professional treatment. The NAR/HUD VAMA was extended through a negotiated Memorandum of Understanding between NAR and HUD in 1981, and will, in all likelihood, be extended yet again this year for another five years. Indeed, the NAR/HUD VAMA is being cited by HUD as an example of successful public-private cooperation in an effort to persuade other housing industry groups to execute a similar Agreements.

In sum, the NATIONAL ASSOCIATION OF REALTORS® is committed to making the fair housing laws work for all Americans. But this objective cannot, in our view, be acheived unless certain fundamental questions are confronted and resolved.

THE PURPOSE OF THE FAIR HOUSING LAWS MUST BE CLARIFIED

Various amendments have been offered to the Federal Fair Housing laws since 1979. These amendments have, for the most part, sought to increase substantially the penalties imposed on persons deemed to have violated the Fair Housing Laws, create a so-called "streamlined" administrative enforcement mechanism, or both.

These approaches ignore a basic truth: it is grossly unfair to impose commercial "capital" punishment on a real estate broker, and, at the same time, force him to respond in an administrative forum where his procedural rights are curtailed when the law under which he is being prosecuted does not

objective of the Fair Housing Laws has arisen because Congress apparently assumed that the twin objectives of "integrated housing" and "open housing" are not in conflict. As a HUD General Counsel expressed it:

> "...the two goals to [Title VIII]--integration and nondiscrimination or freedom of choice--were perceived by Congress to be complimentary. Congress anticipated that the abolition of racially discrimination housing practices would ultimately result in residential integration."[5]

But nearly two decades of experience with the Fair Housing Act suggests that "open housing" does not necessarily or even probably produce "integration." It may produce "white flight", resegregation or continued racial polarization. "Open housing" also may produce minority concentrations, not through discrimination, but through the preference of persons for the cultural, political, and social benefits of such concentration. It is now clear beyond any reasonable doubt that freedom of housing choice does not necessarily result in choices that produce "integration".

This reality presents the issue that is central to this Hearing and to the future of Fair Housing, and that issue is whether, by whom, and by what means, if any, can freedom of housing choice, or "open housing" be legally restricted, constrained, foreclosed, or influenced to further the goal of racial, religious or ethnic integration.

1. Whether Freedom Of Housing Choice May Be Constrained

The NATIONAL ASSOCIATION OF REALTORS® and its membership currently understand the existing Fair Housing Act absolutely and unequivocally to forbid any constraint, direct or indirect, on freedom of housing choice that

---

5. HUD Memorandum. January 16, 1981, Jane McCrew to Laurene B. Simois, pp. 1-4.

is based on race, color, religion, sex or national origin. This understanding is derived not only from our reading of the Fair Housing Act[6], but also from the Supreme Court's ruling in Jones v. Mayer Co., 392 U.S. 409 (1968), which did not qualify its holding that the Civil Rights Act of 1866:

> "...bars all racial discrimination, private as well as public, in the sale and rental of property."

This understanding is also the product of the harsh lessons of litigation in which the Supreme Court and inferior courts, state and federal, have consistently refused to recognize any justification or basis for discouraging, limiting or denying minority access to housing opportunity based on race.[7]

Consistent with this understanding, the National Association incorporated Article 10 into its Code of Ethics which provides that its members:

> "...shall not deny equal professional services to any person for reasons of race, creed, sex or country of national origin," and "...shall not be a party to any plan or agreement to discriminate against a person or persons on the basis of race, creed, sex or country of national origin."

This ethical mandate is enforced by grievance and complaint procedures available to the public as well as other members, and reinforced by educational programs, by Local Board Equal Opportunity Committees, and by participation in a Voluntary Affirmative Marketing Agreement with HUD.

Proponents of "integration maintenance", however, reject "equal housing opportunity" as a legal or moral absolute. Instead, they assert that the Nation's interest in establishing and preserving an integrated society is so compelling that it outweighs any coresponding interest in preserving free housing choice for individual citizens. Under this concept, "racial steering"

---

6. Civil Rights Act of 1968, Section 804.
7. Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972); Gladstone, REALTORS® v. Village of Bellwood, 441 U.S. 91 (1979).

may be either "discriminatory" and, hence, illegal, or "benign" and, hence, permissible, depending upon whether it promotes pro-integration moves or results. Under the concept of "integration maintenance," it is the end and not the means that determines the legality of discriminatory conduct.

2. By Whom May Freedom Of Housing Choice Be Constrained

It is the understanding of the NATIONAL ASSOCIATION OF REALTORS® that no one has or should have the power to constrain or deny the freedom of housing choice of another. We had thought that the prohibitions against "redlining," "restrictive covenants," and other forms of discrimination in the sale or rental of housing proscribed by the Fair Housing Act of 1968 made this unequivocally clear.

The advocates of "integration maintenance", however, do not accept this proposition. In their view, freedom of housing choice may be discouraged or restricted if it is done by a community, or by a non-profit fair housing organization, or by a community sponsored "preferred real estate broker." HUD itself is on record as construing Section 804 of the Fair Housing Act as prohibiting real estate agents from

> "informing clients of homebuying opportunities in only certain areas because of race, attempting to steer clients through the use of information about the racial composition of certain neighborhoods, or otherwise attempting in any way to induce homebuyers to purchase dwellings in certain neighborhoods and not others because of race"

while at the same time expressly declaring

> "..that a non-profit fair housing organization engaging in such activities should not be deemed to be in violation of Section 804."[8]

8. Letter from S. Leigh Curry Jr., Deputy General Counsel of HUD, to Werner Petterson, dated February 6, 1981.

3. By What Means May Freedom Of Housing Choice Be Constrained

It is the understanding of the NATIONAL ASSOCIATION OF REALTORS® that the "ability to pay" is only legitimate constraint on freedom of housing choice. We understand that there can be no discrimination in the terms and conditions of financing that would make a property unaffordable because of race, religion, sex, or national origin.

"Integration maintenance" comtemplates many means by which freedom of housing choice can be constrained.

The first and most blatant constraint is the quota. This is the means adopted by the Starrett City housing complex in Brooklyn, New York out of fear that without a quota the development would become all Black. Quotas are the ultimate and most effective mechanism to assure that the desired mix of races is achieved, but they also involve a substantial, if not total, abrogation of freedom of housing choice.

The other constraints implemented in the name of "integration maintenance" include restraints on access to information concerning available housing opportunities. These restraints include "for sale" sign bans, and "anti-solicitation" ordinances applicable only to real estate transactions. Notwithstanding the Supreme Court's holding in Linmark Associates, Inc. v. Township Willingboro, 431 U.S. 85 (1977), that the Township's ban on real estate "for sale" signs was unconstitutional even though its purpose was to promote integrated housing, communities continue to enact and enforce such "for sale" sign bans.[9] Anti-solicitation ordinances are also enacted to

---

9. Hazel Crest, County Club Hills, Glenwood, Blue Island, University Park, Calumet Park, and Chicago, Illinois all have enacted ordinances banning the placement of "for sale" signs by real estate brokers.

limit access by homesellers to the full range of real estate services offered by real estate brokers and to compel or at least encourage the public to utilize "preferred brokers," municipal real estate offices, and fair housing counselors committed to integration maintenance.

The second category of "free choice" constraints often utilized in the name of "integration maintenance" include "counseling" programs designed to encourage or discourage moves depending on whether they are consistent or inconsistent with the established integration goals of the community. These counseling programs are sometimes operated by the community, as in Oak Park, Illinois, sometimes under a contract with a private "housing center" as in Park Forest, Illinois, and sometimes through arrangements with real estate brokers who are given "preferred broker" status by a community so long as they encourage "pro-integration" moves in their marketing practices.

The third category of constraints on "free choice" involve direct financial incentives for "pro-integration" moves. A recent example of such incentives is a widely publicized Oak Park, Illinois ordinance that offers $1,000 to a landlord and $300 to a lessee willing to participate in what the Village deems a "pro-integration" move. Another example of so-called "incentives" to induce pro-integration housing choices is the Cuyahoga County Model Bonus Program operated in 1985 by the Ohio Housing Finance Agency (OHFA). Under this Program, 51 Cleveland suburbs and 19 city neighborhoods were labeled on maps as areas eligible for Black buyers. Correspondingly, 13 suburbs and 22 city neighborhoods were labeled as areas eligible for White buyers. If a buyer of the appropriate race sought to purchase a home in an "eligible" area, the buyer could receive a mortgage loan at nearly two percentage points below the then prevailing market rate.

Programs such as the Oak Park plan and the Cuyahoga County Model Bonus Plan render impossible the "color blind" marketing of real estate, which of course, is their objective. Indeed, some observers have characterized these

78-076 0 - 88 - 5

programs as integration achieved through government "bribes"[10]

But perhaps the most significant government incentive program is that presently administered by HUD's Chicago Regional Office. HUD's Chicago office conditions the availability of FHA loan guarantees in Chicago's Marquette Park neighborhood upon an applicant's willingness to be "counseled" at the HUD Chicago office before they are even shown properties in the denominated neighborhoods. The objective of the counseling is to discourage the use of FHA financing in sales that would "destabilize" an area that is currently predominately White.

HUD agreed to this program as a condition in a settlement agreement that terminated litigation against HUD by certain Marquette Park residents who contended that HUD has a duty to take neighborhood demographics into account when granting FHA loan guarantee applications. The same claims asserted against the VA were dismissed in 1986,[11] but as far as we know, HUD still maintains its Marquette Park counseling program.

4. The Integration Maintenance Dilemma

The dilemma presented by integration maintenance programs is monumental for those engaged in the real estate business. On the one hand, real estate brokers and their associations are requested to participate in such programs and are sued when they decline.[12] On the other hand, a HUD Deputy General

---

10. Smolla, In Pursuit of Racial Utopias: Fair Housing, Quotas, and Goals in the 1980's, 58 S. Cal. L. Rev. 947, 957 (1985)
11. Jorman v. Veterans Administration, No. 77 C 581 (N.D. Ill., Opinion filed Sept. 11, 1986).
12. South Suburban Housing Center v. Greater South Sububan Board of REALTORS®, No. 83 C 8149, (N. D. Ill., filed Nov. 13, 1983)

Counsel has ruled that any form of racial steering, counselling, or other discrimination by a real estate broker or salesperson is illegal and HUD has refused to reconsider this position despite our requests.[13]

But, the dilemma of integration maintenance goes far beyond the pressure and confusion felt by the real estate profession. It goes to the very essence of the Fair Housing Laws.

For if integration maintenance is legal anywhere, it must be legal everywhere because illegal discrimination cannot be merely a function of geography.

And, if integration maintenance is legal for some participants in the housing market, then it must be legal for all participants because the legality of discrimination cannot be merely a function of the marketing method or the marketer selected.

And, if integration maintenance is to be legal, then a decision must be made as to when a community or neighborhood is sufficiently integrated to permit the minorities deemed overrepresented to be barred or discouraged from entry.

And, if integration maintenance is to be legal, then a decision will have been made that Blacks must remain a minority everywhere unless and until they become a majority everywhere with all the consequence that decision signifies for the capacity of Blacks to make their voices heard.

And, if integration maintenance is to be legal, then a decision will have to be made as to how we can justify the dispersal of people who would choose to live together without stigmatizing and sterotyping those people as dangerous, undesirable and uncontrollable risks to society in general.[14]

---

13. See Curry letter, infra, at note 8.
14. See Smith v Cleveland Heights, 760 F.2d 720 (6th Cir. 1985) (Black citizen of municipality had standing to challenge municipality's integration maintenance ordinance because ordinance "stigmatized" Blacks as unwelcome.)

And, if all of these decisions are to be made, a decision must be made as to who will make them and by what process they will be made.

We had thought that the Fair Housing Act of 1968 had repudiated for all time the claim that any person had the right to tell another person where he could or should live. If we are now to reestablish a guardian of the racial, religious, or ethnic composition and integrity of our communities, it must be done by this Congress under the Constitution and not by communities operating independently.

For these reasons, we strongly endorse the provision contained in Section 4(a) of the bill recently introduced by Senator Hatch, which expressly defines the purpose of the Fair Housing Act as insuring "equal access to housing". Senator Hatch's bill also expressly rejects in Section 4(b) any notion that the Fair Housing Laws are intended to acheive any particular proportion of residents within housing units or neighborhoods based upon race, color, religion, sex, handicap or national origin. We believe that this amendment would resolve the current confusion over the meaning of "Fair Housing", and unequivocally declare the policy of the United States as insuring equal housing opportunity for all Americans--a policy to which the National Association has long since committed itself and its members.

THE DEFINITION OF "AGGRIEVED PERSON" SHOULD BE LIMITED

The Hatch bill adds an additional definition to the current law that makes clear that "aggrieved persons" are those whose bona fide attempt or offer to purchase, sell, lease or rent real estate has been frustrated by a discriminatory housing practice. In contrast, the bill introduced by Senators Kennedy and Specter defines an "aggrieved person" as a person who claims to

have been injured, or will be injured by a discriminatory housing practice. The definition proposed by Senators Kennedy and Specter would codify the expansive view of Fair Housing standing announced by the United States Supreme Court in Havens v. Coleman, 455 U.S. 363, (1982). The Supreme Court's decision in Havens not only conferred standing upon real estate "testers" who receive false information about available housing, but also reaffirmed earlier holdings that recognized Fair Housing "injury" based upon an interference with a person's "right to live in an integrated society."

We submit that the definition found in the Kennedy/Specter Bill, which adopts existing Supreme Court precedent, effectively eliminates any limits on who can sue a real estate broker for an alleged discriminatory housing practice. This is true because the Supreme Court has thus far failed to define with any specificity the scope of the "society" in which the "injured" person must live, or when that society becomes "integrated" such that practices which allegedly disturb that "integration" become actionable.

It is the position of the NATIONAL ASSOCIATION OF REALTORS® that Congress never intended in 1968 that the class of persons entitled to sue under the Fair Housing Act includes any persons other than those for whom housing had actually been made unavailable by reason of a discriminatory practice. We also contend that such a limitation on the definition of "aggrieved person" is necessary before any consideration can be given to staggering increases in the penalties against those found to have committed a discriminatory housing practice. To fail to adopt such a limitation on the class of persons entitled to bring a Fair Housing complaint would permit a real estate broker to be "penalized" out of business upon a charge brought by a person whose connection with the alleged discriminatory practice is so tenuous as to be non-existent. Such a result trivializes Article III of the Constitution to the point of making it irrelevant.

THE CONCILIATION PROCESS SHOULD BE STRENTHENED, NOT WEAKENED

A stated major objective of the various bills to amend the Fair Housing Act has been to provide a "less cumbersome" alternative to the federal courts to resolve allegations of discriminatory housing practices. The NAR uniformly supports alternatives to costly and time-consuming litigation to resolve disputes. But it is the position of the NATIONAL ASSOCIATION OF REALTORS® that the most effective alternative to litigation in Fair Housing disputes is the conciliation process that is currently contained in Section 810 of the Fair Housing Act. This process should be strengthened not weakened.

The bill proposed by Senator Hatch does strengthen the conciliation process, while the bill proposed by Senators Kennedy and Specter renders conciliation less attractive, especially to persons accused of discriminatory housing practices.

The Hatch bill encourages the use of conciliation in at least two ways. First, Section 812(b) of the Hatch bill permits the Attorney General to grant an aggrieved person up to $1000 for legal fees to initiate a civil action if a respondent refuses to conciliate. The prospect of government subsidy of a complainant's attorney's fees is a powerful incentive to a respondent to conciliate, and one which NAR supports. The Kennedy/Specter bill does not contain a similar provision.

Second, the Hatch bill in Section 812(b) insures that the entire conciliation process will be kept confidential. The Kennedy/Specter bill, on the other hand, requires that conciliation agreements be made public and also referred to the Attorney General after more than one agreement has been accepted by a single respondent during a five year period.

We submit that confidentiality is critical to the success of conciliation. Respondents may be willing to conciliate a dispute and agree to a monetary settlement, even when the evidence of guilt is in considerable doubt. Settlements are often made by businessmen on economic considerations rather than assessments of actual liability. A respondent's willingness to settle to avoid the costs, aggravation, and potential adverse publicity of a public adjudication would be seriously undermined if the conciliation agreement was required by law to be made public. Public notice of the agreement could amount to an "invitation" to other potential claimants to come forth regardless of the merits of their claim. This potential for numerous additional claims having little or no merit acts as a powerful incentive to a respondent to avoid conciliation altogether and seek to establish their innocence at all costs.

To the same effect is the Kennedy/Specter bill's requirement that conciliation agreements be referred to the Attorney General if a single respondent enters into more than one agreement in a five year period. A respondent may well avoid conciliation simply to avoid a referral to the Attorney General, which could possibly trigger an investigation into whether a "pattern or practice" charge should be brought.

The Kennedy/Specter bill further requires in Section 810(b)(3) that any conciliation agreement accepted by an aggrieved person and a repondent also be approved by the Secretary of HUD. This provision, again, seems to weaken the conciliation process by conferring upon the Secretary of HUD a "veto" over an agreement presumbably reached after good faith bargaining between the parties involved, under the Secretary's supervison. This requirement of the HUD Secretary's approval is wholly superfluous, and can only interfere with the conciliation process

In conclusion, the NATIONAL ASSOCIATION OF REALTORS® believes that conciliation of disputes under the Fair Housing Law offers the best opportunity for their prompt resolution. The Hatch Bill gives the conciliation process a chance to succeed. The Kennedy/Specter bill seems to relegate conciliation to a "way station" on the road to litigation.

THE ADJUDICATION OF FAIR HOUSING COMPLAINTS NECESSARILY BELONGS IN THE COURTS

One of the most significant issues that confronted Congress in debating the 1979 Fair Housing Act Amendments was whether a process should be created within HUD utilizing Administrative Law Judges (ALJs) appointed and directed by the Secretary of HUD to adjudicate allegations of discriminatory housing practices as an alternative to the federal or state courts. This same basic framework is once again before this Subcommittee in the bill proposed by Senators Kennedy and Specter.

The NATIONAL ASSOCIATION OF REALTORS® again opposes a HUD controlled Administrative Law Judge system for the same basic reasons that NAR has often stated in the past.

First, the ALJ system is of doubtful constitutionality. The Supreme Court has already held that the Seventh Amendment entitles either party to a jury trial in an action brought under Section 812 of the current Fair Housing Act. Curtis v. Loether, 415 U.S. 189, 192 (1974). The ALJ system incorporated in the Kennedy/Specter bill specifically empowers the ALJ to award actual and punitive damages. There is, however, no corresponding right of a respondent to "remove" such a proceeding to a state or federal court. Thus, the respondent's right to a jury trial guaranteed by Curtis v. Loether is denied.

Second, the National Association objects to the ALJ enforcement process because it vests in HUD the status of prosecutor, judge and jury. Combining these functions in a single agency tramples upon basic notions of separation of powers and fundamental fairness.

Third, the ALJ system contemplated by the Kennedy/Specter bill is an alternative to the so-called "cumbersome" litigation only as far as the aggrieved person is concerned. An aggrieved person who is unsuccessful within the ALJ system may nevertheless sue the respondent in federal court. Furthermore, the unsuccessful aggrieved person benefits from a tolling of the applicable statute of limitations for filing a complaint in court during the time the administrative charge is pending. Thus, under the Kennedy/Specter bill, a respondent must endure an additional two year period of jeopardy before his successful defense of the administrative action is a "final" vindication.

Fourth, there is no evidence to suggest that the ALJ system proposed in the Kennedy/Specter bill will be any more efficient, or less cumbersome, than litigation. Indeed, experience suggests that delays and backlogs in an ALJ system will be every bit as great or greater than in the courts. Nor is there any evidence to suggest that ALJs are, or will be, any more "competent" to adjudicate fair housing complaints than federal or state judges. Allegations of discriminatory housing practices do not typically involve highly complex "public rights", as securities, commodities, or antitrust cases often do, which require the so-called "specialized expertise" of an administrative agency to adjudicate. Discriminatory housing practice allegations typically involve a basic factual inquiry to determine whether one person's housing opportunity was made unavailable by another person by reason of illegal discrimination. This is precisely the type of adjudication concerning private disputes over which trial judges commonly preside pursuant to the mandate of Article III of the Constitution.

Simply put, the ALJ system contemplated by the Kennedy/Specter bill does nothing to "streamline" the adjudication of fair housing allegations. Rather, it creates an unnecessary, cumbersome, duplicative, unfair and unconstitutional substitute for the federal or state courts.

Indeed, even Senator Kennedy himself recognized in the floor debate during Senate action on the Fair Housing Amendments Act of 1980 that responsible alternatives exist to an ALJ system to adjudicate allegations of discriminatory housing practices. On December 9, 1980, Senator Kennedy specifically adopted a compromise proposal offered by Senator DeConcini that would have substituted a system utlizing federal magistrates for a system of HUD supervised ALJs.

To be sure, intervening decisions of the United States Supreme Court may well cast doubt on the viability of federal magistrates as alternatives to federal judges to adjudicate disputes in the absence of consent by the parties.[15] But the fact remains that alternatives can and should be found to a system of ALJs to truly streamline the adjudication of discriminatory housing practice allegations, but still preserve basic notions of fairness, objectivity, and finality.

For example, the judicial remedy could be strengthened by providing for minimum "statutory" damages for a fair housing violation. Courts could appoint attorneys for plaintiffs who are indigent or otherwise unable to secure representation. Cases brought under the fair housing laws could be accorded "expedited" treatment in the federal courts, and given priority over all cases on the civil docket. Finally, binding arbitration could be encouraged as is currently provided in both the Hatch bill and the Kennedy/-Specter bill.

---

15. Northern Pipeline Construction Co. v Marathon Pipe Line Co., 458 U.S. 50 (1982).

THE DEFINITION OF "HANDICAPPED" SHOULD BE PRECISE, AND EXCLUDE PERSONS WHO PRESENT A THREAT TO PUBLIC SAFETY

The National Association endorses unequivocally the concept of prohibiting discrimination on account of "handicap." However, the definition of the term "handicap" contained in the Kennedy/Specter bill is entirely too vague to constitute a meaningful guide to conduct. Under that definition, a person can be deemed handicapped not merely if he has a physical or mental impairment, but also if he is "regarded as having such an impariment."

The definition provides no criteria by which it can be determined when a person can be "regarded" as having an impairrent. Nor is it clear how the seller, landlord, or agent is to know or learn how the person is "regarded" especially when privacy laws limit access to medical records and other sources of private and personal information. Nor is there any definition of the "major life activities" which must be impaired or how those activities are to be distinguished from "minor life activities" or for that matter how the seller, landlord or agent is to discover what a person's "major life activities" might be.

The Kennedy/Specter definition of "handicapped" is in truth a non-definition which creates unlimited ambiguities and uncertainties and has the potential for generating unnecessary, costly and unwarranted litigation. Given the serious consequences which would flow from discrimination against the handicapped, the definition should be refined to the point where it can be reasonably understood by those who must interpret and apply it.

The "handicapped" definition in the Hatch bill is a significant improvement over that found in the Kennedy/Specter bill. First, the Hatch definition clearly specifies that "handicapped" means an impairment of a person's ability to see, hear, walk unaided, or live unattended. Second, the

Hatch bill's definition makes clear that "handicapped" does not include drug or alcohol abuse, or other impairment that could present a threat to the safety or property of others.

The National Association also supports the provisions of the Hatch bill that clarify that the handicapped tenant must bear the costs of any necessary modification to a housing unit to accomodate a tenant's handicap, as well as the costs of restoring the unit to its original condition once the handicapped tenant's occupancy ends.

PROVISIONS DEALING WITH HOUSING OPPORTUNITIES FOR FAMILIES WITH CHILDREN SHOULD ACCORD MAXIMUM FLEXIBILITY TO LANDLORDS

The NATIONAL ASSOCIATION OF REALTORS® endorses maximum housing opportunities for families with children. We likewise support the legitimacy of specially developed housing units reserved primarily or even exclusivey for the elderly. In this regard, we endorse the provisions of the Kennedy/Specter bill that include "familial status" among those classifications upon which discrimination is prohibited, but also exempts projects designed specifically as housing for the elderly.

We would, however, urge that any legislation approved by this Subcommittee guarantee the right of a developer or a landlord to adopt a plan of occupancy that would specifically allocate units within a development as suitable for families with children, and other areas that would be limited to families without children, or single adults. We believe this flexibility is appropriate so as to maximize the enjoyment of the development by all residents.

The National Association appreciates this opportunity to present its views to the Subcommittee on a matter so vital to the real estate industry, and the Nation as a whole.

Senator KENNEDY. Mr. Smolla.

STATEMENT OF RODNEY A. SMOLLA

Mr. SMOLLA. Senator, thank you for this opportunity to address some of the constitutional and policy issues posed by this bill.

Much has been said in the courts and in the commentary of legal scholars about the legislative history of the Fair Housing Act of 1968. But rather than concentrate on the strict legislative history of that act, I think it is useful to look at the cultural history.

We must remember that the House of Representatives passed that bill without debate only days after the assassination of Martin Luther King, days in which my own home town, Chicago, and other cities around the Nation were consumed in the anguishing, grieving violence that came in the aftermath of that assassination.

This Congress, in enacting that legislation, held out to blacks and others the dreamland that Martin Luther King would never live to see. After living for centuries as an underclass, deprived blatantly and subtly by both private and public action of an integrated community, that bill held out a promise perhaps even more important than integration in schools and in the workplace. It held out the possibility of integration in neighborhoods.

Yet, sadly, that wonderful dream has not been fulfilled. Somehow, the people in this room have failed. You as Senators have failed, your legislative aides have failed, we as law professors have failed, and real estate agents have failed, community leaders and civil rights workers have failed.

Why today, 20 years after that act, is segregation so stubborn? Why have we achieved almost no significant progress in integrating our neighborhoods? I think I know the answer, and it is, in fact, suggested by perhaps the most eloquent dissenting opinion in the history of the Supreme Court, Justice Harlan's haunting dissent in *Plessy* v. *Ferguson*.

He cut through all the racist apologies for separate but equal and said everybody knows why Louisiana passed that law mandating the separation of the races; it was bigotry, pure and simple.

I submit to you today that in our hearts everybody knows—without the aid of statistics and sociological data—we know why segregation remains to persistent today in American society. It is because, unhappily, too many white families are still today unwilling to live in close proximity to a substantial number of blacks, Hispanics, and other minorities.

Unlike other areas of civil rights legislation, the Fair Housing Act has been willing in spirit but weak in flesh. Now, as an outsider to this process, I urge everyone to approach this bill with a sense of history. It is perhaps more than any other bill that you will look at this year something that you can leave to the posterity in America.

It is important that we put teeth into the fair housing laws.

Now, I want to take the last minute or two to address one specific issue involving a unique problem that has come out of the frustration with attempts to desegregate our neighborhoods, and that is the unique problem of benign steering and integration maintenance.

These plans are proliferating in both the private and public sectors around the United States, and they take basically two factual patterns. The first involves some explicit quota or ceiling on minority entry into a housing project or into a community.

For example, a suburb that has been traditionally white might invite black entry, but then say that once black entry reaches a pre-determined level—25 percent would be typical—it is to be shut off. The same sorts of mechanisms have been used in public housing.

A more subtle sort of mechanism, the second sort of mechanism, involves a more porous target in which a similar percentage, such as 25 or 30 percent black or Hispanic, is set. Once that entry level is reached, methods are used to steer or deflect minority entrants away. The euphemisms are many.

If you look at these sorts of plans, you see that they generally partake of one of two theories. The first is what is known as the mirror approach. This has been a popular approach in Chicago.

The idea goes something like this: You look at the demographics of an overall metropolitan area. In Chicago, for example, you see that there are 80 percent whites and 20 percent blacks, roughly, to simplify. Then you hypothesize that every community in that area ideally ought to reflect that racial balance and that that is fair housing. The problem, of course, is fair to whom?

In that sort of mechanism, what we, in effect, do is say to people that have been historically discriminated against that because of the color of your skin and because of our altruistic notions as to what an ideal racial balance is, we will accept some of your kind but not too many.

Ultimately, these plans are always based on an accommodation of white prejudice. Why do you need racial occupancy controls in these communities? The answer is clear, because of the fear that if you do not have them, the housing project or the community will precipitously tip and become 100 percent black or Hispanic.

It is as if that itself was a social evil, as if members of minority groups were somehow typhoid Mary-type carriers of social ills. None of us want substandard housing, poor communities services, bad sanitation or poor schools. But if that is the concern of these communities, we ought to address those concerns directly.

I think this is not, in fact, affirmative marketing that we are talking about. It is not even reverse discrimination in the normal affirmative action sense. It is a cruel twist on that idea; it is double reverse discrimination.

It asks members of those groups that have historically been discriminated against to bear the brunt of the social cost of the ideal of integration.

So I would urge that you consider at least the possibility, in the spirit of compromise and giving, of a proviso in this Act that would make it clear that except when ordered by a court or by an administrative law judge to remedy some specific violation of law, devices that mandate specific ratios of balance among ethnic groups within a community or within a housing project ought to be illegal.

Thank you.

[Prepared statement follows:]

TESTIMONY OF RODNEY A. SMOLLA

The Fair Housing Act, the Constitution and the Special Problems of Integration Maintenance and Benign Steering

By Rodney A. Smolla*

Introduction

Integration maintenance plans have been around for some time and may be increasing in popularity in some quarters. In the last 3 years, several important test cases have reached the lower courts. Three provocative examples are *Arthur v. Starrett City Associates*,[1] *Williamsburg Fair Housing Committee v. New York City Housing Authority*,[2] and *Burney v. Housing Authority of the County of Beaver*.[3] The allegations in the *Starrett City* case are that the defendants are operating a housing complex in Brooklyn, New York, with approximately 17,000 tenants, pursuant to a racial quota limiting the percentage of apartments rented to minority-group members to 30 percent. The *Williamsburg* case involved a housing project operated on a quota allocating 75 percent of the apartments to whites, 20 percent to Hispanics, and 5 percent to blacks. The *Burney* litigation involved a more fluid quota system utilized by the Housing Authority of Beaver County. With regard to each housing project run by the authority, if the percentage of black-occupied units in a project was greater than the percentage of black-occupied units in all of the housing authority's units, then the project was labeled as having a "black racial imbalance" and whites had priority for apartments in it. Conversely, if the percentage of black-occupied units in the project was less than the percentage of black-occupied units in the total number of authority projects, the project was labeled as having a "white racial imbalance." In all three cases the plaintiffs were *minority-group* organizations and individuals who claimed that these "ceiling quotas" discriminated against them on the basis of race or ethnic heritage. In all three cases the defendants attempted to justify the "integration maintenance" quotas on the grounds that they were necessary to prevent "tipping" and "preserve integration." The two primary legal challenges to integration maintenance involve the equal protection clause of the 14th amendment and the Fair Housing Act, Title VIII of the Civil Rights Act of 1968.[4]

Constitutional Analysis

Purposeful Intent

The first constitutional line of defense for integration maintenance is that such plans, because they are enacted from benign and altruistic motives, are free

* Associate Professor of Law, University of Arkansas School of Law.

[1] 89 F.R.D. 542 (E.D.N.Y. 1981) (*see also*, United States v. Starrett City Associates, 605 F. Supp. 262 (E.D.N.Y. 1985).

[2] 493 F. Supp. 1225 (S.D.N.Y. 1980).

[3] 551 F. Supp. 746 (1982).

[4] 42 U.S.C. §§3601-3609.

of any "discriminatory intent" and are, therefore, completely immune from equal protection attack. It is, of course, quite accurate that under the Supreme Court's holdings in cases such as *Washington* v. *Davis*,[5] *Arlington Heights* v. *Metropolitan Housing Development Corp.*,[6] and *Personnel Administrator of Massachusetts* v. *Feeny*,[7] discriminatory intent must be proved to establish an equal protection violation. "Purposeful discrimination," the Court has held, "is the 'condition that offends the Constitution.'" Because the "central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct on the basis of race," there can be no constitutional violation in the absence of purposeful intent to discriminate. But the attempt to characterize integration maintenance plans as immune from equal protection attack for lack of discriminatory intent completely misconstrues what the Supreme Court means by "purposeful" or "intentional" discrimination, by confusing "intent" with "motive."

In all of the Supreme Court decisions that have elaborated on the intent requirement, the statute or regulation at issue has been *facially neutral*. In contrast to the public housing dispute in *Arlington Heights*, or the job exam dispute in *Washington* v. *Davis*, for example, both of which involved challenges to classifications facially unrelated to race, the integration maintenance plans all involve a purposeful, acknowledged use of racial criteria. In *Washington* v. *Seattle School District No. 1*,[8] the Court clearly distinguished between facially neutral and racially explicit governmental activity, saying that "when facially neutral [action] is subjected to equal protection attack, an inquiry into intent is necessary, to determine whether the [action] in some sense was designed to accord disparate treatment on the basis of racial considerations." So too, in *University of California Regents* v. *Bakke*,[9] which involved the allegedly "benign" but nonetheless explicit use of race, the Court again emphasized that "this is not a situation in which the classification is on its face *racially neutral*, but has a disproportionate racial impact. In that situation, plaintiff must establish an intent to discriminate." And in *Feeny*, the Court held that "a racial classification, *regardless of purported motivation*, is presumptively invalid and can be upheld only upon an extraordinary justification." In sum, integration maintenance plans quite clearly *do* involve purposeful discrimination within the meaning of that requirement as used by the Supreme Court.

Selecting the Proper Equal Protection Test

The second line of defense for integration maintenance is the claim that even if such plans are subject to constitutional scrutiny, the level of that scrutiny should be something lower than the stringent "strict scrutiny" standard that normally applies when racial classifications are at issue. The lower courts that have dealt with this contention have *unanimously* rejected it, all have applied strict scrutiny. These courts have been in the unenviable position of trying to make sense of the confusing Supreme Court holdings in *Bakke* and *Fullilove* v. *Klutznick*.[10] The lower courts have, nonetheless, done an excellent job of reaching the most plausible explanation of *Bakke* and *Fullilove* in the context of integration maintenance. Faced with an integration maintenance case, the Supreme Court today would surely invoke strict scrutiny. The Supreme Court held in *Bakke* and *Fullilove* that some forms of governmental race-conscious activity are permissible under the equal protection clause. The Justices produced 11 separate opinions in the two cases. The Burger Court, understandably, is as divided as American society, as divided as the Republican and Democratic parties, on precisely how to address the government's "ameliorative" use of race. Despite the multiplicity of opinions in the two cases, however, the messages in the opinions *for the limited purpose of analyzing integration maintenance* are reasonably clear and uniform.

A definitive majority exists on the Court in support of three positions. (1) some use of race in governmental programs is permissible, but its use is limited to programs that are "remedial"; (2) the term remedial refers only to programs that *enhance* minority opportunity in response to the lingering effects of past racial discrimination; and (3) even remedial race-conscious programs are illegal if they are not well tailored to effectuate their remedial purposes. If the opinions in *Bakke* and *Fullilove* are reduced to their lowest common denominator, even

[5] 426 U.S. 229 (1976)
[6] 429 U.S. 252 (1977)
[7] 442 U.S. 256 (1979)
[8] 458 U.S. 457 (1982)
[9] 438 U.S. 265 (1978)
[10] 448 U.S. 448 (1980)

those Justices who are the most lenient in approving the remedial use of race would absolutely prohibit race-conscious programs that reinforce racial stereotypes, promote racial separatism, or ask minorities to bear the brunt of the social cost of a "benign" program.

For the present, the Court has rejected the position originally articulated by the first Justice Harlan in his dissent in *Plessy* v. *Ferguson*, that "[o]ur Constitution is colorblind." In *Bakke*, the petitioner, Alan Bakke, challenged the validity of a special admissions program for minority students at the medical school of the University of California at Davis. Four members of the Court, Justices Brennan, White, Marshall, and Blackmun, voted to uphold the special admissions program, stating that the "government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice. . . ." Justice Powell, who cast the critical swing vote in *Bakke*, agreed with these Justices that government may in some circumstances use race as a selective criterion. He held, however, that the particular race-conscious program used by the Davis medical school was constitutionally impermissible because it tended to pursue racial preference for its own sake, rather than for valid educational reasons. The remaining four Justices never reached the constitutional issue, holding that the Davis program violated Title VI of the Civil Rights Act of 1964, which they construed to be colorblind. Thus, the peculiar judicial compromise in *Bakke* approved in principle of the government's use of race as a selective criterion, but struck down the particular racially selective program before the Court.

The cloud of ambiguity over the constitutional status of affirmative action that existed after *Bakke* was to some degree lifted by the Supreme Court's decision in *Fullilove*, in which the Court for the first time placed an unequivocal stamp of approval on a race-conscious governmental activity. Seven Justices in the case agreed that the government could engage in race-conscious activity in some circumstances, and six Justices approved the specific race-conscious program that was at issue. *Fullilove* involved the validity of the minority business enterprise (MBE) provision of the Public Works Employment Act of 1977, a congressional spending program that required, absent an administrative waiver, that 10 percent of the Federal funds granted under the program for public works projects be used to procure services or supplies from businesses owned and controlled by members of statutorily defined minority groups. Chief Justice Burger, who was joined by Justices White and Powell, announced the judgment of the Court and flatly rejected the contention that "in the remedial context the Congress must act in a wholly colorblind fashion." Justices Marshall, Brennan, and Blackmun adhered to their position in *Bakke* and approved of the government's use of race to "provide benefits to minorities for the purpose of remedying the present effects of past racial classification." Justice Stevens, though finding the MBE provision unconstitutional, refrained from embracing a colorblind standard. Only two members of the *Fullilove* Court, Justices Stewart and Rehnquist, held that the Constitution is colorblind—that it countenances absolutely no use of race-conscious activity by the government.

Every Justice who reached the constitutional issue in both *Bakke* and *Fullilove* refused to accept at face value the government's assertion that the program did, in fact, remedy the present effects of past discrimination, and instead attempted to penetrate beneath labels to ensure that the particular program did, in fact, effectuate genuinely remedial objectives. A program that does not, in fact, enhance the opportunities of minorities will not survive the scrutiny of the Court under any of the tests discussed below.

The Court's consensus is not undercut by the division among the Justices regarding the exact standard of review. Justice Powell stands alone in his clear adherence to the "strict scrutiny" test as traditionally articulated: The government's racial classifications are invalid unless they are made in pursuit of "compelling" governmental objectives and are "narrowly tailored" to achieve those objectives. Three Justices, Brennan, Marshall, and Blackmun, have adopted a two-tier analysis. They apply the strict scrutiny test to racial classifications that are "invidious," but apply a more relaxed "intermediate" standard of review when they perceive the race-conscious activity at issue as remedial or benign. Under their intermediate test, the government's objectives need be merely "important," rather than "compelling," and need be only "substantially related," rather than "narrowly tailored," to the accomplishment of the objectives.

Chief Justice Burger and Justices White and Stevens apparently have abandoned precise articula-

tions of the standard of review. Chief Justice Burger's opinion in *Fullilove* expressly eschewed the adoption of any of the competing "formulas of analysis," and Justices White and Stevens apparently agree with the Chief Justice that the formulas are not of much assistance in deciding cases. Nevertheless, those three Justices do apply a test that is identical to the second prong of the strict scrutiny test. They require that a program be narrowly tailored to the effectuation of its goal. The Chief Justice and Justice White deviate sharply from the conventional strict scrutiny formula, however, in refusing to test the importance of the government's goal. They ask only whether the government has the power under the Constitution to adopt the objective.

Justices Brennan, Marshall, and Blackmun have been the most permissive Justices in approving race-conscious activity by the government. Even those three Justices have, however, repeatedly emphasized the difference between genuinely remedial programs and programs that are enacted in a good-faith belief that they are benign, but because of their motives, assumptions, or effects are rendered impermissible. In *Bakke*, Justice Brennan stated that the Davis medical school's plan did not "contravene the cardinal principle that racial classifications that stigmatize—because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism—are invalid without more." His opinion also stated that a plan is not benign merely because the legislature so believes. "'[T]he mere recitation of a benign, compensatory purpose is not an automatic shield'," and "the line between honest and thoughtful appraisal of the effects of past discrimination and paternalistic stereotyping" is not always clear. Articulating a concern critical to the integration maintenance debate, the opinion indicated that state programs ostensibly designed to ameliorate the effects of past discrimination risk creating stigma "since they may promote racial separatism and reinforce the views of those who believe that members of racial minorities are inherently incapable of succeeding on their own."

In addition to distinguishing truly remedial programs from those that stigmatize, Justice Marshall in *Fullilove* differentiated programs that disadvantage whites relative to blacks from programs that disadvantage blacks relative to whites. Whites, unlike blacks, are "'not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process'." The three Justices seemed aware of the problems arising from remedial programs that whites design, and emphatically adhered to the principle that "any statute must be stricken that singles out those least well represented in the political process to bear the brunt of a benign program."

It would seriously distort the *Bakke* and *Fullilove* decisions to interpret them as authorizing in broad terms the government's good-faith use of race. To the contrary, both decisions evince a general hostility toward racial classifications, but exempt programs that convincingly demonstrate a sound connection to remedying the effects of past discrimination. Since the *Bakke* and *Fullilove* decisions, the lower courts, consistent with this narrow interpretation, have uniformly held that programs using racially restrictive quotas must satisfy Justice Powell's rigorous strict scrutiny test to survive constitutional challenge.

Applying Strict Scrutiny

The third line of constitutional defense for integration maintenance is that even if the strict scrutiny standard does, in fact, apply to such programs, the interests served by integration maintenance are sufficiently compelling, and the means employed sufficiently well tailored, to survive even the rigorous strict scrutiny test. This level of the constitutional argument is the most problematic, for it involves a number of complex constitutional considerations, and it implicates a deep philosophical split within American culture.

Are the Ends Compelling?

The first step in the application of the strict scrutiny test is the determination of whether the governmental interest in promoting integration maintenance is "compelling." Defenders of integration maintenance argue that, *of course*, the governmental interest at stake is compelling because the interest is the preservation of integration. This is not, obviously, an insubstantial argument—no one can deny that in American society today the achievement and maintenance of integration are compelling values; it seems almost racist to assume otherwise. But the matter is not that simple, for it depends upon what one *means* by the goal of "integration." "Integration" may mean breaking down racial barri-

ers to freedom of choice in housing; in short, it may mean the elimination of discrimination. Every American of good will hates racism and endorses the elimination of racial discrimination. Every American of good will would agree that the goal of "integration," defined in this sense, is compelling. "Integration" may have a second meaning, however, and with regard to its second meaning, Americans of good will may reasonably differ. To some, "integration" means more than the elimination of discrimination; it means the *achievement of results*. Applying this second meaning, to achieve the result of racial mixing and racial balance, one must at times use unpalatable means. In the context of integration maintenance, "integration" has a *third* meaning: To achieve "ideal" results, one may even go so far as to penalize members of the racial group that suffered from discrimination in the first place.

To understand fully the governmental objectives underlying integration maintenance, the immediate purpose of altering the racial mix by limiting black entry should be placed in the philosophical and jurisprudential context from which that purpose is derived. Integration maintenance reflects at least two classic strains of American legal and social thought. The first, utilitarianism, is the belief that restrictions on individual freedom are permissible when necessary to achieve the greatest good for the greatest number of people. The second, the universalist ethic, is an assimilative ideal that holds that a country's public policy should achieve "balanced" or "proportional" racial and ethnic representation in all aspects of the Nation's culture.

Utilitarian thought is not new in the context of racial policy. In *Parent Association* v. *Amoach*,[11] the U.S. Court of Appeals for the Second Circuit was faced with a program that limited black enrollment in certain public schools by quotas designed to deter white flight from those schools, a plan analogous to integration maintenance:

> The constitutional issue thus posed is not unfamiliar in a democratic society. The greatest good for the greatest number is a concept deeply embedded in our history. It is ironic that it comes full circle in a case involving minority groups where the issue may be viewed as a conflict, not necessarily between the claims of whites and those of non-whites, but between the competing rights of non-whites themselves. May an individual non-white student be made to suffer exclusion in a community effort to prevent resegregation of the system?

The court in *Amoach* answered its rhetorical question in the affirmative and in doing so explicitly subordinated the idea that individuals should not be treated differently on the basis of race to the idea that racially disparate treatment is permissible if it is done for the "greater good"—to avoid white flight and preserve a stable racial mix.

The "greater good" as defined in *Amoach* evokes a strain of American legal thought, of which integration maintenance is a part, that assumes that a "balanced dispersal" of blacks throughout all segments of society is desirable for its own sake. Professor Mark Yudof describes this intellectual tradition as the "universalist ethic":

> The cornerstone of the liberal, progressive thinking is what might be called a universalist ethic, the basic premise of which is that a stable, just society, without violence, alienation, and social discord, must be an integrated society. Segregation of the races in public institutions, employment, and housing will inevitably lead to conflict and the destruction of democratic values and institutions. In short, the goal is a shared culture in which all segments of the population participate.[12]

Proponents of integration maintenance, drawing on these values, argue that their result-oriented view of "integration" is clearly compelling. To buttress this position, a connection is sometimes drawn between integration maintenance and affirmative action. Integration maintenance proponents, in fact, like to treat their plans as simply one form of affirmative action. For those who are against affirmative action, of course, this linkage will lead to an immediate rejection of integration maintenance. But proponents of integration maintenance are willing to throw away those "votes" in return for enlisting the allegiance of those who favor affirmative action. Since Federal courts have approved the affirmative action goal in a number of cases as "compelling," this strategy would seem very wise, since the "votes" of Federal judges are often of immediate concern. The equation, thus, goes something like this: Integration maintenance is affirmative action; if you're with us on affirmative action, you're with us on integration maintenance.

This equation, however, is also too simplistic—it just ain't necessarily so, either in practice or in theory. That something is wrong with the equation ought to be evident immediately as a matter of

---

[11] 598 F.2d 705 (2d Cir. 1979).

[12] Yudof, "Equal Educational Opportunity and the Courts," 51 Tex. L. Rev. 411, 457 (1973).

realistic practical politics. Black civil rights groups (of course, there are exceptions) often favor the concept of affirmative action, yet they often (again, there are exceptions) oppose integration maintenance. To many blacks, the goals of integration maintenance are quite apparently not identical to affirmative action. Integration maintenance does not depend on the consent of blacks, individually or as a group. The governing bodies of predominantly white communities impose integration maintenance in order to prevent the community from becoming predominantly black. Blacks do not participate significantly in the political processes that produce integration maintenance plans. The utilitarian thesis is inappropriate for integration maintenance because in all cases the group asked to bear the burden is predetermined and membership is inescapable. The majority, defining the "greater good" in its own terms, dictates the burdens to be borne by the few. Integration maintenance is simply not on the same moral footing as other race-conscious programs that claim an ameliorative purpose.

A primary function of the 14th amendment is to remove racial issues from the transitory whims of majoritarian politics. If the meaning of the equal protection clause as it has evolved from *Plessy v. Ferguson* through *Brown v. Board of Education*, *Bakke*, and *Fullilove* is that minority rights may not be sacrificed even if the entrenched majority perceives that sacrifice to be for the greater good, and if the clause's limitations on government activity are, like many of the core limitations of the Constitution, designed to insulate minorities without political power from the machinations of the political process, then the integration maintenance rationale fails, because it supplies a utilitarian answer to an essentially nonutilitarian question. Although it is perfectly permissible for individuals of any race to believe as a matter of personal ideology that communities with black populations of approximately 30 percent enjoy an "ideal" racial mix, does the Constitution permit the government to embrace such racial distribution preferences? The constitutional issue thus posed is not whether the governmental decisionmaker has added his sums correctly in computing the greater good, but whether the color of skin is a legitimate predicate for the assignment of pluses and minuses.

Integration maintenance is, in this sense, an affront to emerging black expressions of power, dignity, enterprise, and self-reliance. The conflict between assimilation and resurgence of ethnic identity has been particularly strong for American blacks. Since the 1960s, individual blacks frequently have chosen to emphasize their group identity as a means of achieving greater political and economic power. Increased black ethnic identity as a political phenomenon repeats a familiar American pattern. Particularly in the Nation's older cities, it has never been thought wrong or unusual for persons to emphasize their own ethnicity to gain political or social advantage. Similarly, although discrimination against blacks undoubtedly accounts for much of their concentration and collective isolation in urban areas, it is impossible to eliminate choice of ethnic association as a reason for the concentration. In short, Americans often choose to group themselves on an ethnic basis because they perceive that identification as economically, politically, or culturally advantageous.

Integration maintenance seeks to prevent concentrations of blacks. If the integration maintenance concept is projected to its logical conclusion, blacks would be diffused evenly across the metropolitan landscape. With that geographic dispersal, black political power would be diluted, and the strength of the black economic, political, religious, and cultural institutions that facilitate cohesive group identity and consciousness would be diminished.

The lexicon of integration maintenance reveals the concept's inherent cultural condescension. Concentrations of blacks are almost always called ghettos. The condescension is not pernicious but unintentional; it arises from a tendency to assume that the ghetto pattern of existence is the natural mode of living for urban blacks. This perception is reinforced when the black suburb is merely a physical extension of a truly urban ghetto, even though sociologists classify a substantial percentage of the black population in the United States as middle class. It is racial stereotyping to assume that a middle-class community may be labeled a "ghetto" because over half of its residents are blacks.

It may be assumed that no rational person seeks out dilapidated housing, poor neighborhood schools, high crime, and substandard police and fire protection. It may not be assumed, however, that a rational person does not want to live in a black neighborhood. Government must not equate the two. Individual blacks with the means to move to the suburbs may or may not wish to live in neighborhoods in which there has been substantial black entry. Unfortunately, no individual black can be sure that his

entry into a white neighborhood, when combined with the entry of other blacks, will not cause an exodus of whites. Surely, however, individual blacks deserve the freedom to make decisions of affiliation. Integration maintenance presumes that restrictions on choices for blacks are permissible because otherwise whites will exercise their own choices and move away. Black political and cultural cohesiveness and majority status is the practical, and arguably deliberate, consequence of the balance that is struck.

Although the Constitution is not colorblind, *Bakke*, *Fullilove*, and the equal protection cases that preceded them appear to reject the proposition that government may pursue an "ideal" level of racial balance as an end in itself. The Supreme Court has allowed government to use race as a tool only to achieve educational or economic objectives that the Court believes are directly linked to overcoming past discrimination against minority groups. Each time the Court has approved the government's limited use of race, it has emphasized its belief that a logical link exists between the racial policies of the government program and the objective of remedying the effects of prior racial prejudice. In those cases the Court has also found that the government program uses race as a tool to eliminate the effects of prior prejudice in a manner devoid of stigmatizing racial stereotypes and without adverse effects on members of any racial minority. The Court has never approved the utilitarian notion that race may be used to circumscribe minority rights in the interest of the "greater good."

In *Swann* v. *Charlotte-Mecklenburg Board of Education*,[18] Chief Justice Burger, writing for a unanimous Court, stated that school boards could voluntarily adopt prescribed ratios of black students to white students for each school within a system, even in the absence of a constitutional violation. Chief Justice Burger noted, however, that the Court would not approve the notion that there is a "substantive constitutional right" to "any particular degree of racial balance or mixing. . . ." He acknowledged, however, the power of a school board faced with a history of segregation to use its awareness of the racial imbalance as a starting point for voluntarily dismantling a dual school system.

Similarly, Justice Powell in *Bakke* approved of the government's pursuit of pluralism in education, writing that "the attainment of a diverse student body. . . clearly is a constitutionally permissible goal for an institution of higher education." Powell proceeded, however, to focus on the distinction between educational pluralism and racial balance for its own sake. That distinction is the crucial point in his opinion and thus in the judgment of the *Bakke* Court. Powell stated that the Davis medical school's pursuit of ethnic pluralism was permissible only as "one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body. . . ." By contrast, ethnic pluralism pursued for its own sake is neither a compelling state interest nor a constitutionally permissible goal: "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."

Describing race as one in a wide range of factors that should be considered in the interest of academic pluralism—a factor incident to developing a student body capable of enjoying a robust exchange of ideas and perspectives—Powell rejected the argument that the permissible educational pursuit of diversity requires reserving a specified number of spaces for a given racial group. On the contrary, Powell argued that a specific racial quota hinders the attainment of true diversity.

Nothing in the majority coalition in *Fullilove* modifies the *Bakke* holding that the government's pursuit of racial diversity for its own sake is constitutionally proscribed. Although the six Justices who voted to uphold the minority business enterprise provision differed in their characterizations of the congressional purpose as "compelling," "substantial," or merely "legitimate," they uniformly agreed on the congressional purpose. They characterized the MBE program as a strictly remedial measure, aimed at the elimination of barriers to minority-firm access to public contracting opportunities. The Court concluded that Congress' aim was to achieve *equality of opportunity only*, through race-conscious means tailored to eliminate the lingering effects of past discrimination that continued to make opportunity unequal.

Justice Powell's concurring opinion in *Fullilove* emphatically reaffirmed the position that racial preference per se "can never constitute a compelling state interest." After concluding that the MBE

[18] 402 U.S. 1 (1971).

program permissibly addressed the interest of ameliorating the effects of past discrimination. Powell emphasized that he continued to adhere to the position that racial classifications cannot "be imposed simply to serve transient social or political goals, however worthy they may be."

Are the Means Narrowly Tailored?

Even if it were conceded that the ends behind integration maintenance are compelling, the strict scrutiny test requires that the means chosen to achieve those ends be precisely and narrowly tailored to achieve their effectuation. It is on this second prong of the strict scrutiny test that integration maintenance most clearly falters. Integration maintenance fails the "means" side of the strict scrutiny test for at least two reasons. First, it severely infringes the right of black *individuals* to exercise freedom of choice in housing, a freedom that is a necessary corollary to the right to travel. Second, it predicates governmental policy on avoiding white flight and accommodating white prejudice.

The premise that government has a right to intervene in the geographic distribution of the population cannot be reconciled with the right to travel, a right that has long been part of the Nation's culture and that has recently been elevated to constitutional status. American history is largely a history of migrations. Long before the Supreme Court recognized the freedom to travel as a constitutional right, Americans assumed that citizenship carried with it the privilege to move about the country unfettered by restrictive governmental regulation.

Article four of the Articles of Confederation explicitly guaranteed the right to travel from State to State, but neither the Constitution nor any subsequent amendment mentions this right. Nevertheless, as early as 1823 judicial pronouncements recognized the right to travel as implicit in the constitutional structure. In 1849 Chief Justice Taney wrote in dissent in the *Passenger Cases*:[14]

> For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.

During this century the right to travel has emerged as a fundamental constitutional right. In *United States* v. *Guest*,[15] Justice Stewart observed that "freedom to travel throughout the United States had long been recognized as a basic right under the Constitution," and in *Shapiro* v. *Thompson*,[16] the Supreme Court stated "that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules or regulations which unreasonably burden or restrict this movement."

Prior to the Civil War, of course, blacks who were held as slaves did not enjoy the right to travel. In *Dred Scott* v. *Sandford*,[17] Justice Taney, who had declared in ringing terms the fundamental nature of the right to travel, wrote for the Supreme Court that the slave Dred Scott did not obtain emancipation for himself or his family by traveling from the slave State of Missouri to the free State of Illinois. Blacks, wrote Taney, "had for more than a century before [the Declaration of Independence and the adoption of the Constitution] been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had not rights which the white man was bound to respect." Free blacks from Northern States also were subject to travel restrictions prior to the Civil War. For example, several slaveholding States adopted legislation to preclude the entry of free blacks in order to deter slave uprisings.

In light of this unfortunate legacy, it is difficult to defend any government program that inhibits the free exercise of the right of blacks to travel, even if the action discourages black entry obliquely rather than directly. A black does not have the same right to travel as a white if an ordinance prohibits the sale of property on a certain block to blacks because blacks constitute 30 percent of the residents. Although the black may still be permitted to purchase in nearby villages, his right to travel is abrogated because the essence of the freedom to travel is choice.

In housing, the right to travel unshackled by racial restrictions is coupled with the traditional notion of Anglo-American law that every parcel of property

[14] 48 U.S. (7 How.) 282 (1849).
[15] 383 U.S. 745 (1966).
[16] 394 U.S. 618 (1969).
[17] 60 U.S. (19 How.) 393 (1856).

is unique. Specific enforcement of a land sale contract is permitted because the law assumes that no other piece of real estate is an adequate substitute for the real estate described in the contract. Any restriction on the right to live where one wishes is a substantial one.

The second reason that integration maintenance fails the "means" test is the flaw in the utilitarian position that integration is justified by the "greater good" of avoiding white flight. Theoretically benign political calculations of the greater good based on race have an unfortunate history in America. In 1917, long before *Brown* v. *Board of Education*, the Supreme Court in *Buchanan* v. *Warley*,[18] struck down a municipal ordinance enacted by the city of Louisville, Kentucky. The ordinance was strikingly similar to a modern integration maintenance plan, making it unlawful:

> for any colored person to move into and occupy as a residence, place of abode, or to establish and maintain as a place of public assembly any house upon which a greater number of houses are occupied as residences, places of abode, or places of public assembly by white people than are occupied as residences, places of abode, or places of public assembly by colored people.

The city openly declared its motives for adopting the ordinance, which were probably generally regarded as benign in 1917: "to promote the public peace by preventing racial conflicts; . . . to maintain racial purity; [to prevent] the deterioration of property owned and occupied by white people, which deterioration, it is contended, is sure to follow. . . ." The ordinance stated that its objective was "to prevent conflict and ill-feeling between the white and colored races in the City of Louisville, and to preserve the public peace. . . ." Indeed, the ordinance was adopted for many of the same motives as was the statute in *Plessy* v. *Ferguson*, which required separate passenger cars for black and white riders on trains. The majority in *Plessy* had characterized the "separate but equal" statute as "enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class." Although the Supreme Court accepted Louisville's assertion that the ordinance was desirable in promoting public peace and preventing racial conflicts, the Court struck down the ordinance, holding that such aims "cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."

Modern integration maintenance plans can be distinguished in *motive*, but *not in purpose* from the Louisville ordinance struck down in *Buchanan*. Although current plans facially resemble the Louisville ordinance, the representatives of communities or housing projects who adopt such plans today do so not out of racial animus. Nevertheless, integration maintenance plans rest on an uneasy juxtaposition of conflicting motives. They arise in suburbs and projects containing white families whose individual tipping points converge to form a community tipping point—the point at which the community's collective racial prejudices and fears cause white evacuation. The means chosen by the governing body to prevent evacuation is simply to engage in official race discrimination, even if that body is itself motivated only by racial tolerance.

The question can be illustrated by hypothesizing two suburbs that enact identical integration maintenance plans. One suburb is a long-established town on the outskirts of Boston that still makes all its major governmental decisions in town meetings. The second suburb employs a modern representative form of government such as a city council. The first community convenes a meeting to discuss the "problem" of incipient black entry into the town. After a large number of residents say they will leave if black entry exceeds 25 percent, the town adopts an integration maintenance ordinance, with two-thirds of the town's residents voting to approve it. The ordinance requires brokers to discourage black entry once such entry exceeds 25 percent of the population.

If we were to poll the residents of the town to discover their motives for approving the plan, the social science evidence indicates that there would probably be a wide variety of responses. Some residents were probably motivated purely by racial animus—some white families are unwilling to live on the same block with a black family even if by all objective indicia there is no danger that the entry of one black family will have any effect whatsoever on the safety or prosperity of the neighborhood. As expressed in *Trinity Episcopal School Corp.* v. *Rodney*,[19] "[i]n large measure, the tipping point is subjective and prejudicial reaction of whites to

[18] 245 U.S. 60 (1917).

[19] 347 F. Supp. 1044 (S.D.N.Y. 1974).

minority group encroachment." Those residents motivated by such separatist notions would be echoing the rationale advanced by Louisville to defend its ordinance in 1917, but in language less offensive to the contemporary ear.

Although blind prejudice would motivate some of the residents, the sociological data indicate that most residents would probably explain their action in less emotional terms, professing to be relatively free from racial prejudice against blacks. Instead, they would explain their vote as motivated by fear of the imminent deterioration of their neighborhood if black entry is not controlled. The residents in this category would fear a decline in property values, an increase in crime and vandalism, and an erosion of the quality of neighborhood schools and essential government services.

The ordinance enacted by such a town meeting would be plainly unconstitutional, even though actual racial animosity may have accounted for only a small percentage of the votes. The myriad cultural and economic forces present at the town meeting were distilled into an overtly racial solution. It is irrelevant that in functioning as social planners, the town's citizenry may arguably have acted "in good faith"; it is enough that they chose racial means to attack perceived social and economic problems.

A series of Supreme Court decisions has held that mere community opposition cannot repress the imperatives of the equal protection clause. In *Brown II*, the decision implementing the school desegregation cases of 1954, the Court declared that "the vitality of [the] constitutional principles [set forth in *Brown I*] cannot be allowed to yield simply because of disagreement with them." In *Monroe v. Board of Commissioners*,[20] the Court reaffirmed this mandate by striking down a "free-transfer" plan used to desegregate the public schools in Jackson, Tennessee, because the principal effect of the plan was to retain racially identifiable schools rather than to dismantle the dual school system. Rejecting the school authorities' argument that "without the transfer option it is apprehended that white students will flee the school altogether," the Court ordered the school board to achieve a nonracial, nondiscriminatory system and to ignore the prospect of community opposition. Several years later, in *United States v. Scotland Neck Board of Education*,[21] the Court invalidated the establishment of a new school district even though the school officials argued that the new district was necessary to avoid the exit of white students from the system into private schools. The Court declared that white flight is not a justification for failing to uproot a racially discriminatory school system.

Integration Maintenance and the Fair Housing Act of 1968

Analysis of integration maintenance under the Fair Housing Act of 1968 is important for two reasons. First, the Fair Housing Act reaches private activity because it is enacted pursuant to the 13th amendment. Thus, a "benign quota" imposed by a privately owned apartment complex receiving no governmental aid of any kind would still come within the Fair Housing Act's coverage, even though it would be beyond the coverage of the 14th amendment for lack of "state action." Secondly, for both purely private and governmental housing activity, the Fair Housing Act creates a lower standard of proof than exists in a 14th amendment case.

The Elements of a Statutory Violation

In enacting the Civil Rights Act of 1866, which is currently embodied in section 1982 of the United States Code, Congress declared in apparently unequivocal language that "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property." In the 1968 watershed decision, *Jones v. Alfred H. Mayer Co.*,[22] the Supreme Court held that section 1982 prohibits *"all* discrimination against Negroes in the sale or rental of property—discrimination by private owners as well as discrimination by public authorities."

Two months before the *Jones* decision, Congress had enacted the Fair Housing Act, embodied on Title VIII of the Civil Rights Act of 1968. In its opening section the statute declares that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." The operative provisions of Title VIII are contained in section 3604, which defines and makes unlawful five separate types of racially discriminatory activity. Subsections (a) and

[20] 391 U.S. 450 (1968).
[21] 407 U.S. 484 (1972).
[22] 392 U.S. 409 (1968).

(b) of section 3604 provide that it is unlawful to deny "a dwelling to any person because of race, color, religion, sex, or national origin" or "to discriminate in terms, . . .or in provision of services or facilities" associated with the sale or rental of real estate.

The operative provisions of section 1982 and Title VIII flatly prohibit consideration of race in the sale and rental of housing in the United States. Construed broadly by the lower courts to effectuate its purposes, Title VIII, like Title VII of the Civil Rights Act of 1964, proscribes activity with discriminatory effects, even if the defendant had no subjective intent to discriminate. A violation of Title VIII can thus "be proved without establishing a malevolent or unlawful intent. . . . [and] allegedly benign motivation. . . .cannot provide a defense."[30] In *Zuch v. Hussey*,[31] a groundbreaking decision, the district court held that section 3604(a) prohibits exerting any effort "to steer or channel a prospective buyer into or away from an area because of race."

Integration maintenance plans, thus, have tougher sledding against an alleged Title VIII violation than against an alleged equal protection clause violation, for in order to establish a prima facie case, the plaintiff need show only that the action complained of had a racially discriminatory effect; he is not required to show that the defendant acted with racially discriminatory motivation.[32]

Once the plaintiff has established a prima facie case, the prevailing view is that the burden then shifts to the defendant to establish a justification for acts resulting in discriminatory effects. The justification must serve, in theory and practice, a legitimate, bona fide interest of the Title VIII defendant, and the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact. If the defendant fails to rebut the prima facie case, a violation is proved. If the defendant does introduce evidence that no such alternative course of action can be adopted, the burden will once again shift to the plaintiff to demonstrate that other practices are available.

Integration Maintenance and the "Affirmative" Enforcement of the Act

Some courts and commentators have suggested that differential treatment according to race in the housing market does not violate Title VIII if such treatment is undertaken pursuant to the mandate of an integration maintenance statute. The rationale is that because integration maintenance plans seek to preserve racial balance, they further the goal of the statute.

To support this view, some litigants have cited a different provision of the Fair Housing Act, which provides that "[t]he Secretary of Housing and Urban Development shall . . . administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter."[33] It has been argued that pursuant to section 3608(d), there is an obligation to act affirmatively to promote integration, and that integration maintenance plans are sometimes necessary to comply with that obligation. Supporters of integration maintenance generally rely on *Otero v. New York City Housing Authority*[34] as support for this interpretation of the dictates of Title VIII.

The language used by Congress in these various provisions has created confusion as to the nature and extent of HUD's duty under Title VIII. If HUD's duty is limited to enforcing nondiscrimination in housing, the administration of integration maintenance quotas would not be authorized. If HUD is required to act "affirmatively" to promote and maintain integration in housing, racial occupancy controls could conceivably (depending on one's definition of "affirmatively") be permissible in certain circumstances.

The legislative history of Title VIII does not very clearly resolve the question of the statutory validity of integration maintenance quotas. The most realistic and honest interpretation of that history indicates that Congress probably never even considered the question of HUD administration of such quotas. There was virtually no legislative debate regarding the affirmative duties placed on the Secretary of HUD under section 3608(d)(5). What the legislative history does reveal is that the primary congressional intention in passing the legislation was to break up

[30] United States v. Reece, 457 F. Supp. 43, 48 (D. Mont. 1978).
[31] 394 F. Supp. 1028 (E.D. Mich. 1975).
[32] See, e.g., Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1287–90 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025, 98 S.Ct. 752, 54 L.Ed.2d 772 (1978); Smith v. Anchor Building Corp., 536 F.2d 231, 233 (8th Cir. 1976); Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032 (2d Cir. 1979).
[33] 42 U.S.C. §3608(d).
[34] 484 F.2d 1122 (2d Cir. 1973).

residential concentrations of minorities and to foster integrated living patterns.[28] Congress also intended to promote *freedom of choice* in housing and to prevent humiliation resulting from racially discriminatory housing practices.[29]

The legislative history further shows that, at the time that Title VIII was enacted, Congress believed that strict adherence to the antidiscrimination provisions of the act would promote the policy of antisegregation; abolition of racially discriminatory housing practices ultimately would result in residential integration. In other words, Congress perceived antisegregation and antidiscrimination to be complementary.

In *Otero*, the court declared that the affirmative obligation under section 808(e)(5) of the Fair Housing Act[30] to promote residential integration outweighed the duty under that statute to prevent discrimination. The serious flaw in the *Otero* reasoning is that it reads far too much into the word "affirmative." Given Congress' heavy emphasis on the antidiscrimination principles of the act, the far more natural reading of Congress' intention in using the word "affirmative" is that Congress wanted the implementation of the act to be *aggressive*. Congress wanted HUD to do more than sit back and wait for notice of violations. Congress wanted HUD to advise, cajole, advertise—to do, in short, what was necessary to deliver the message that the national policy was now strongly against race discrimination. "Affirmative" was not meant to be taken in the sense of *restrictive quotas*, but in the sense of "affirmative marketing," the energetic effort to break down racial barriers, not create new ones.

Integration Maintenance and the "Standing" Cases

The second argument made by proponents of integration maintenance to support their view that such plans are permitted by the Fair Housing Act comes from certain language in three Supreme Court decisions involving standing to sue under Title VIII. The Supreme Court has decided three cases that take an expansive view of litigant standing under the Fair Housing Act. Those three decisions, *Trafficante v. Metropolitan Life Insurance Co.*,[31] *Gladstone, Realtors v. Village of Bellwood*,[32] and *Havens Realty Corp. v. Coleman*,[33] contain statements that might be regarded as supporting the use of ceiling quotas. In the *Trafficante* case, a black tenant and a white tenant of a San Francisco apartment complex that housed 8,200 residents brought suit against the owner of the complex, claiming that the owner discriminated against nonwhites by making it known that they would not be welcome at the complex, manipulating waiting lists for apartments, delaying the processing of nonwhite applications, and using differential acceptance standards. Their complaint alleged that they had "lost the benefits of living in an integrated community," that they had missed "business and professional advantages which would have accrued if they had lived with members of minority groups," and that they had suffered "embarrassment and economic damage in social, business, and professional activities from being 'stigmatized' as residents of a 'white ghetto'." There were conceivably two obstacles to finding standing in *Trafficante*. First, one of the complainants was white, yet all discrimination was directed against nonwhites. Second, both the white and black plaintiffs already had apartments in the complex and were, thus, not the immediate victims of discriminatory refusals to rent. In an opinion by Justice Douglas, the Supreme Court, nonetheless, found that both plaintiffs had standing. The alleged "injury," Justice Douglas wrote, was the "loss of important benefits from interracial associations." This injury was encompassed by the Fair Housing Act, Douglas stated, because "[t]he person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is, as Senator Javits said in supporting the bill, 'the whole community'." Douglas also cited the statement by Senator Walter Mondale that the purpose of the act was to achieve "truly integrated and balanced living patterns." Douglas concluded that the Court could "give vitality to [the Fair Housing Act] only by a generous construction which gives standing to sue to all in the same housing unit who are injured by racial discrimination in the management of those facilities within the coverage of the statute."

[28] *See* 114 Cong. Rec. 4322 (1968) (remarks of Sen. Mondale) (one result of Fair Housing Act would be that "rapid, block-by-block expansion of the ghetto will be slowed and replaced by truly integrated and balanced living patterns").

[29] *See id.* at 3643 (remarks of Sen. Mondale) (Title VIII gives blacks freedom to move where they will and "removes the opportunity to insult and discriminate against a fellow American because of his color").

[30] 42 U.S.C. §3068(d)(5).

[31] 409 U.S. 205 (1972).

[32] 441 U.S. 91 (1979).

[33] 445 U.S. 363 (1982).

Trafficante was followed by *Gladstone, Realtors v. Village of Bellwood*. The plaintiffs in *Gladstone* were the village of Bellwood, Illinois, a suburb of Chicago, a black resident of Bellwood, four white residents of Bellwood, and a black resident of the adjoining suburb of Maywood, Illinois. The plaintiffs claimed that two real estate brokerage firms in the area were engaging in racial steering. Blacks, the complaints alleged, were shown homes for sale in an integrated section of Bellwood and were steered away from homes in predominantly white areas. Prospective white buyers, on the other hand, were guided away from the integrated area of Bellwood. All of the individual plaintiffs in the litigation were not, in fact, seeking to purchase homes in Bellwood, but were rather acting as "testers," confederates posing as home buyers to determine if prospective black and white buyers were treated differentially by the real estate agencies. In the Supreme Court, the defendant real estate brokers argued that neither the village of Bellwood nor any of the individual plaintiffs had standing to sue. The Supreme Court held that the village and the four white residents living in the impacted area all had standing.

In discussing the standing of the village of Bellwood, Justice Powell, writing for the Court, used language that certainly does at first blush seem to support the concept of integration maintenance. The Court noted that the "adverse consequences attendant upon a 'changing' neighborhood can be profound." In using the peculiar word "changing," and placing it in quotation marks, Powell appeared to be endorsing the notion that a municipality may treat the "changing" of its population from white to black as "adverse." This interpretation is buttressed by Powell's further observation that if steering practices significantly reduce the total numbers of buyers in the Bellwood housing market, real estate prices may be deflected downward. "This phenomenon would be exacerbated," Powell wrote, "*if perceptible increases in the minority population directly attributable to racial steering precipitate an exodus of white residents.*" Such a reduction in property values diminishes the tax base, and leads to "[o]ther harms flowing from the realities of a racially segregated community." Powell stated that there "can be no question about the importance to a community of 'promoting stable, racially integrated housing'." If the defendant agencies have begun "to rob Bellwood of its racial balance and stability," the village has standing to challenge the legality of their conduct.

With regard to the four white Bellwood residents, the Court noted that they had claimed injury in that "the transformation of their neighborhood from an integrated to a predominately Negro community is depriving them of 'the social and professional benefits of living in an integrated society'." The Court found these allegations of injury sufficiently "distinct and palpable" to confer standing. The injuries could be social and professional, and also economic. The "most obvious source" of economic injury "would be an absolute or relative diminution in value of the individual respondent's homes." Finding these allegations of injury sufficient, the Court did not reach the question of "tester standing" in *Gladstone*, and the Court did not find that the two black plaintiffs, neither of whom resided in the "target" areas of Bellwood, had sufficient allegations of individualized harm to permit them standing.

The issue of "tester standing" was finally reached in the third of the Supreme Court standing cases, *Havens Realty Corp. v. Coleman*. The *Havens* litigation was commenced by three individuals, two black and one white, and a public interest group, Housing Opportunities Made Equal (HOME). The defendant, *Havens Realty*, owned and operated two apartment complexes in Henrico County, Virginia, a suburb of Richmond. One of the black plaintiffs alleged that, in attempting to rent an apartment, he was falsely told by Havens that none was available. The other two individual plaintiffs were testers; the white tester plaintiff was told that apartments were available for rental, while at the same time the black tester plaintiff was told that there were no vacancies. The complaint identified the plaintiff HOME as a non-profit organization, with a multiracial membership of about 600, devoted to the purpose of making "equal opportunity in housing a reality in the Richmond Metropolitan Area." HOME's activities included the operation of a housing counseling service and the investigation and referral of complaints involving housing discrimination. Echoing the complaints in *Trafficante* and *Gladstone*, the tester plaintiffs in *Havens* alleged that they had been deprived of the "important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices." For its part, HOME alleged that the steering practices of Havens had "frustrated" the organization's counseling and referral services, with a consequent drain on resources.

As it had in *Trafficante* and *Gladstone*, the Court in *Havens* took an extremely liberal view of standing under the Fair Housing Act. In a unanimous opinion by Justice Brennan, the Court reemphasized that, in enacting the Fair Housing Act, Congress intended to extend standing to the full limits of Article III. On the question of tester standing, Justice Brennan wrote that the combination of section 804(d) of the Fair Housing Act and section 812(a) of the act made it unlawful merely *to represent* that a dwelling is not available because of race, color, religion, sex, or national origin. The act, in short, created a legally enforceable right to truthful information about available housing. This meant that the *black* tester did have standing because she was allegedly lied to, in violation of her statutory right to truthful information, but that the *white* tester did not have standing because he was told that apartments were available, which was the truth.

Justice Brennan then turned to the concept of "neighborhood standing" that had previously been developed in *Trafficante* and *Gladstone*, and that is the most significant for purposes of the integration maintenance debate. Once again, the Supreme Court reaffirmed that standing existed to contest the social, professional, and economic losses that arose from racial steering practices. On the issue of HOME's standing, the Court said that the alleged impairment of HOME's ability to provide counseling and referral services was sufficient injury, in fact, to supply standing.

In combination, these three standing cases create the illusion that the Supreme Court would look quite charitably at integration maintenance. All three emphasize the benefits that flow from interracial associations. *Gladstone* seems to go even further, emphasizing the legitimate claim of a municipality itself in maintaining racial stability. More than any other case ever decided by the Supreme Court, in fact, a facial reading of the language in *Gladstone* does seem to support integration maintenance. The language seems to acknowledge the importance and legitimacy of preventing a neighborhood from precipitously "changing."

The apparent support for integration maintenance in the standing cases, however, is superficial only; on closer examination, that support dissolves. The first flaw in treating the standing cases as supporting integration maintenance is that the facts of all three cases involved housing practices designed to keep blacks *out* of a particular market. In all three cases, the people actually primarily harmed by acts of discrimination were blacks. The apartment owner in *Trafficante* tried to avoid renting to blacks; the brokers in *Gladstone* would not show blacks homes in the "pure white" neighborhoods; in *Havens*, it was the black apartment seeker and the black tester who were lied to. From a realistic perspective, the standing cases involve the enlistment of whites, municipalities, and public interest groups in the battle to eliminate discrimination against minorities. Whites were given standing, it is true, but *not* for the purpose of *limiting* black entry into neighborhoods or apartment complexes, but for the purpose of *assisting* that entry. The Supreme Court, in effect, took an expansive view of standing in *Trafficante*, *Gladstone*, and *Havens* in order to broaden the army of combatants in the pursuit of the primary goal of the Fair Housing Act, elimination of discrimination against minority-group members.

When recast in light of the factual realities in *Trafficante*, *Gladstone*, and *Havens*, the message of the standing cases is, thus, actually antithetical to integration maintenance. Justice Powell, for example, wrote in *Gladstone* that the white residents had standing because they lived in a neighborhood "whose racial composition allegedly [was] being manipulated . . . ." Surely, it is an inversion of both the logical and moral principles of the standing cases to maintain that because *Trafficante*, *Gladstone*, and *Havens* permit whites who *favor* black entry to sue to strike down barriers to entry, municipalities that fear the exit of whites who *disfavor* black entry can enact new barriers to black entry, thereby avoiding an exodus of prejudiced or fearful whites. The legal interest recognized in *Gladstone*, *Trafficante*, and *Havens* is the interest all citizens in a community share in living in neighborhoods that are not racially skewed because of discrimination; it is not the interest in living in a community no more than 30 percent black.

The second flaw in attempting to garner support for integration maintenance from the standing cases is that it puts interpretations on the words of the authoring Justices that we know *from other cases* those Justices could never have intended. The *Trafficante* opinion, for example, was written by Justice Douglas. His statement about the "benefits from interracial associations" could be interpreted to endorse implicitly the principle of penalizing blacks to serve the "higher" goal of preserving interracial associations, or it could have the more simple

meaning that whites have an interest in opening doors to blacks so that they are not cut off from interracial contact. We know from one of Justice Douglas' most famous opinions, *DeFunis* v. *Odegaard*,[34] that he *must* have intended the second interpretation. In *DeFunis*, Douglas wrote that he viewed the affirmative action admissions program at the University of Washington law school as unconstitutional. The Washington quota system, Douglas wrote, impermissibly required one to "determine which groups are to receive such favorable treatment and which are to be excluded, [and] the proportions of the class to be allocated to each." Douglas took an aggressive colorblind position in evaluating the Washington plan. "If discrimination based on race is constitutionally permissible when those who hold the reins can come up with 'compelling' reasons to justify it," he wrote, "then constitutional guarantees acquire an accordionlike quality." To read Douglas' *Trafficante* opinion as endorsing integration maintenance is, thus, to ascribe to Douglas views that he quite clearly found repugnant.

Similarly, to attribute to the author of the *Gladstone* decision a position sympathetic to the philosophical underpinnings of integration maintenance is to affiliate that author with a view completely hostile to the most famous judicial opinion of his life. Given Justice Powell's statements in *Bakke* that racial balancing *for its own sake* is always unconstitutional, and that racially explicit legislation is not entitled to greater judicial deference because it is characterized as benign, his opinion in *Gladstone* cannot be read as an endorsement of benign governmental steering. Justice Powell's jurisprudence in dealing with race cases during his tenure on the Court could not be more antithetical to the philosophical moorings of integration maintenance. One need only recall statements such as those of Justice Powell in the Seattle school district case, that "the Court has never held that racial balance itself is a constitutional requirement," or his conclusions in *Bakke* that it "is the individual who is entitled to judicial protection against classifications based on his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group," or Powell's statement that "Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups" to realize the extreme improbability that Powell could have intended to encourage the integration maintenance philosophy in *Gladstone*.

Finally, to read into the opinion of Justice Brennan in *Havens* an implicit endorsement of integration maintenance is to ignore his statement in *Bakke* that the Davis medical school plan did "not establish a quota in the invidious sense of a ceiling on the number of minority applicants to be admitted." The simple unanimity of the Court in the standing cases, if nothing else, ought to make it clear that no support for integration maintenance can reasonably be garnered from them. In *Bakke* and *Fullilove*, the Court was dramatically divided, and surely, when the Supreme Court does one day hear an integration maintenance case, some division, at least as to analysis (if not result), is very likely. We know with certainty, for example, that Justice Rehnquist, applying his colorblind standard, would find any integration maintenance plan reprehensible. Yet, *Havens* was a unanimous opinion, an opinion in which Justice Rehnquist obviously had no difficulty joining, a state of affairs that would be unthinkable if Rehnquist or anyone else on the Court thought that the philosophical thrust of the opinion was to promote racial quotas and racial steering.

Conclusion

Without for a moment intending to impugn the good faith of the advocates of integration maintenance, the concept is morally and legally wrong. The very minority groups that have so long been victims of discrimination in housing in the United States should not be asked to suffer new, "officially approved" race discrimination merely because white prejudice in some neighborhoods may lead to white flight. The essence of the matter is well captured by a recent Sixth Circuit decision involving the standing of a black resident of Cleveland Heights, Ohio, to challenge that community's integration maintenance policies.

> That the City's alleged policy denies equal treatment is obvious. It creates a favored class based solely on race. Because a race-conscious policy favoring prospective white residents was applied throughout the City, Smith was personally denied equal treatment within that City. White residents of Cleveland Heights were not forced to

[34] 416 U.S. 113 (1973).

shoulder the burden of belonging to a race disfavored for purposes of their City's housing policies. Smith was required personally and directly to bear this burden. No badge of disrespect follows white residents as they follow their daily routines. The City tells Smith it does not want his friends and relatives, even his children, to enter as homeowners. It says, as he perceives it, "we will tolerate you but want no more like you." White residents do not have to live with that official inscription on the courthouse door. For Smith that inscription written into law over the door of his town is an injury. His sense of community is deeply offended because the doorway to his town is an extension, in a symbolic way, of his own doorway.[25]

[25] Smith v. City of Cleveland Heights, No. 84-3099 (6th Cir., slip op. May 3, 1985).

Senator KENNEDY. Thank you. We will get a chance to question you, Professor. You know, I am interested in your remarks on Congress' actions because I would not come down quite so hard. The House of Representatives passed a good Fair Housing Act in 1980 overwhelmingly, with bipartisan support.

More than a majority of the members of the U.S. Senate supported a good Fair Housing Act in 1980 and we were subject to a filibuster.

We did not pass it, and but there have been those on both sides of the aisle in all aspects of this society who have recognized the need for stronger legislation for a long period of time and wanted us to do something about it. We are not just facing this as something new again in 1987.

I remember very well the assurances we were given at that time in 1980 in the late hours of the evening that we were going to get a new proposal from within the administration to deal with some of these concerns and we have just had silence on it.

All of us could have done more I am sure. Many of us have been battling a long time. Our distinguished former colleague, Senator Mathias, from Maryland had been tireless on this issue as well.

Mr. SMOLLA. Senator, I agree with you, by the way.

Senator KENNEDY. Yes.

Mr. SMOLLA. And I think you may have misunderstood me. I think that cultural history actually portends for a more expansive notion of the act and endorses the effort that you are doing it now.

Senator KENNEDY. All we needed was three votes there in 1980 and we probably would not be having this hearing today.

I am troubled, Mr. Butters—I have been listening to your asking about integration maintenance and other kinds of questions and issues that have been raised by the professor and yourself—about some confusion that you might have about what the purpose of fair housing is.

Basically, we are talking about discrimination and, basically, we are talking about exclusion of individuals based upon the color of their skin or the fact that they have some kind of disability or that they have children in their families.

Now, there is really, I do not think, any question at least in my mind of what we are intending to do. Now, you can say, well, that is good intention, but the language is drafted in such a way to dream up all these other kinds of possibilities of confusion in the law.

There is some uncertainty in the law; we understand that. The *Starrett* case now before the court shows that. That is an important issue and an important question, but what we are talking about is whether we are going to—in the area of housing be able to halt discrimination on the basis of race, on the basis of children, and on the basis of their handicap.

Now, I think that is fairly clear from the language of the legislation. I was just reviewing it to see exactly what it says and other language dealing with like kinds of discrimination in other areas.

Lord only knows, we have not had that kind of confusion about the language in those other areas, and I am just troubled about why you think the law is so confused about this.

Mr. BUTTERS. Senator Kennedy, the National Association of Realtors would agree with your characterization of what the fair housing law requires 100 percent; we agree with you.

Discrimination based on race, sex, color—indeed, as far as we are concerned, handicapped and against families with children—is the policy of this country. It was the policy adopted in 1968. Indeed, the Supreme Court in *Jones* v. *Mayer* said it was a policy adopted in 1866. We do not disagree whatsoever. Indeed, we understand federal precedent to require precisely that.

The difficulty we are having, Senator Kennedy, is particularly in certain suburban areas around Chicago, also in suburban areas around—excuse me, Cleveland, and perhaps also, I understand, in suburban areas around Milwaukee, there is a different view that has been expressed to us primarily at the local level, and in Ohio it was expressed through some State legislation, that under certain circumstances it is permissible to target your marketing practices.

Indeed, in some circles the view is that you must target your marketing practices on a specific, race-conscious basis to attract certain groups so as to maintain or not disturb an integrated situation.

Senator KENNEDY. All right. We are going to have 2 days of hearings just on those particular issues that you have raised. Just given the time, let me go through your position on the use of administrative judges. Do you support that mechanism?

Mr. BUTTERS. Not as expressed in the Kennedy-Specter bill, Senator, and I must say the position of the National Association on that point is essentially the same as it was in 1979 and 1980 that the administrative law judge system very likely undermines the constitutional right to a jury trial with respect to the right of an administrative law judge to impose——

Senator KENNEDY. Well, does it undermine it in view of the *OSHA* case where the Court held OSHA is able to give various remedies and make fines? Does it violate it there?

Mr. BUTTERS. As I understand the OSHA legislation, the cases are brought by the U.S. Government for having failed to comply with certain safety standards. They are not essentially an adjudication between two individuals as to whether one individual violated another individual's right to be free of a discriminatory housing practice. We think that is a fundamental difference.

Senator KENNEDY. And your resistance or your opposition is based, then, on the constitutional issue, the seventh amendment?

Mr. BUTTERS. The seventh amendment. We also believe that there are serious questions raised under article III of the Constitution, as articulated in the *Northern Pipeline* case, as to the ability of a non——

Senator KENNEDY. Do you support legislation that would include the handicapped or the physically impaired?

Mr. BUTTERS. We do, Senator, as I indicated in my statement, provided that there is a clear definition that handicapped includes what I would call the traditional forms of handicap—blindness, deafness, inability to walk or move without assistance, or the inability to live without an attendant. That is not a legitimate basis for denying a person housing.

Senator KENNEDY. What about children?

Mr. BUTTERS. We believe that housing opportunities for children should be maximized. We expect or hope that a landlord would be afforded or a developer would be afforded the flexibility within a development or within an apartment building——

Senator KENNEDY. Those provisions are included in the legislation for elderly housing and the rest of those——

Mr. BUTTERS. And elderly as well.

Senator KENNEDY [continuing]. And in accordance with health codes and all the rest.

What do you do about the various leases now that exclude children? Have you taken any position on that? Have the realtors taken a position on it?

Mr. BUTTERS. The position that we have taken is an attempt to interpret the law as to that, which does vary from jurisdiction to jurisdiction currently, and we would support the inclusion of the provisions with respect to families with children in this particular legislation.

Senator KENNEDY. How effective do you think the law has been in terms of eliminating discrimination? As the spokesman for the realtors, how effective has it been in terms of reducing discrimination based on race and handicaps and children? What is your assessment of the current situation?

Mr. BUTTERS. Certainly, to the extent any discrimination still exists, it has been inadequate, Senator. We do have serious questions about the methodology that was used to arrive at some of the statistics that have been cited earlier today as to the 72-percent figure for rental housing and the 48-percent figure as to homeseekers, in that some of those figures were based, as we understand it, on visits to two separate real estate agents within a single firm, and that some of the forms of discrimination that were found were such differences as to whether certain courtesies were extended or whether cups of coffee were offered or things of that nature, which we are not convinced necessarily mean that an act of denial of housing necessarily occurred in that instance.

But to the extent that there are actual instances of denial of equal housing opportunity, this association is committed to eradicating them. We are not here to support any real estate broker who is engaged in acts of denying people housing based upon race, sex, color or any other prohibited category.

Senator KENNEDY. Let me just ask, because my time is up, the provisions dealing with the handicapped—the definition is taken right from section 504 of the Rehabilitation Act. Do you have any problem with that? That has been time-honored; it has been interpreted. There is case law on it, regs on it. Do you have any problems with that?

Mr. BUTTERS. Well, I think we would have some problems to the extent that there may be an issue as to whether certain persons who may have problems that may cause a threat to public health or safety may fall within that provision. That does give us concern.

Senator KENNEDY. Senator Specter.

Senator SPECTER. Thank you, Senator Kennedy.

Mr. Butters, as I understand it, you do agree with the protected class of families with children?

Mr. BUTTERS. Yes, sir.

Senator SPECTER. Do you think that there has been enough of a national problem established to warrant Federal legislation on that issue?

Mr. BUTTERS. Well, we think that this is a form of discrimination that is legitimately a matter of Federal legislation. I mean, we do not have empirical data, Senator, as to how often this occurs, but as far as we are concerned, if it happens at all, it ought to be prohibited.

Senator SPECTER. But you are satisfied that it is an appropriate area for the Federal Government to move into?

Mr. BUTTERS. Correct.

Senator SPECTER. I raise that question with some specificity because Secretary Pierce had raised a question about it.

Mr. BUTTERS. I understand.

Senator SPECTER. You say that you have an objection to use of the administrative law judges. Would you accept a proposal which relied upon Federal magistrates? You said that Senator Kennedy had made that reference in the 1980 debate.

Mr. BUTTERS. Yes, we would. But in all honesty, Senator Specter, I would have to point out that I think the *Northern Pipeline* case does raise some constitutional problems with that form of adjudication as well.

But we would certainly prefer Federal magistrates over administrative law judges, provided that any constitutional infirmities could be satisfactorily resolved.

Senator SPECTER. Well, a Federal magistrate is a lot closer to an administrative law judge in the scheme of things than is an arbitrator.

Mr. BUTTERS. Well, he is more akin, I think, or more within the article III courts than administrative law judge tribunals are.

Senator SPECTER. Well, if you have a problem with constitutional infirmity with administrative law judges, how do you feel about constitutional infirmity with arbitrators who hand down equitable decrees and hand down civil penalties for $100,000, which may be as expensive as a criminal penalty for $100,000?

Mr. BUTTERS. Listening to your exchange with Secretary Pierce earlier this morning, Senator Specter, we would agree totally with the points you were making with respect to the arbitration system.

Senator SPECTER. If you had to choose between administrative law judges and arbitrators, would you take administrative law judges, if you had to choose?

Mr. BUTTERS. In all likelihood, but I hope that that choice is not one that we have to make.

Senator SPECTER. Well, as a matter of preference, at least we have that preference.

Mr. BUTTERS. Well, Senator Specter, could I inject, however——

Senator SPECTER. Sure.

Mr. BUTTERS [continuing]. That we would favor the first form of arbitration that I understood Secretary Pierce to have articulated earlier this morning, which is the use of binding arbitration when the disputants agreed to resort to that form as an alternative to litigation or ALJs or anything else.

Senator SPECTER. Well, the legislation provides for that if the parties agree. It is only where the aggrieved party is looking for a stronger remedy that we move to the administrative law judge.

Mr. BUTTERS. I simply want to make clear that there is an area in which we would support the use of arbitrators.

Senator KENNEDY. Would the Senator yield?

Senator SPECTER. Yes.

Senator KENNEDY. While you were talking about the magistrates versus administrative law judges, I just want to point out at this time that I preferred the administrative law judge in 1980 and I prefer it now.

That was made as part of a compromise in the final hours when it looked like there was still some glimmer of hope of getting that legislation passed. The problem that I see, as I stated at that time, is you have got the same kinds of overburdening of the magistrates and many of the same kinds of problems that we find through the court system.

So I did not want the record to sort of suggest it was my preference for magistrates over the administrative law judges. The administrative law judges are certainly my preference and I think the record has demonstrated compellingly that that is the way to go.

I thank the Senator. I wanted to make that point clear.

Senator SPECTER. Mr. Butters, when you were responding to Senator Kennedy's questions, you said that OSHA was acceptable constitutionally where it was the government suing the individual as opposed to an individual suing the individual.

Mr. BUTTERS. I believe there is a Supreme Court case to that effect that has confirmed the legitimacy of OSHA.

Senator SPECTER. *OSHA* v. *Frank Irey* stands for the proposition that you can have OSHA initiate a lawsuit and have a fine and it is constitutionally acceptable. So you would have no objection to the aspect of the legislation which provided for, say, a HUD enforcement action against an individual defendant?

Mr. BUTTERS. A HUD enforcement action against an individual defendant within an administrative law judge tribunal that would result in fines?

Senator SPECTER. Yes.

Mr. BUTTERS. We would also have serious policy disagreements with the concept——

Senator SPECTER. Well, let us stick with the constitutional infirmity issue. There is no constitutional infirmity there, is there?

Mr. BUTTERS. To the extent that the OSHA holding would be applicable.

Senator SPECTER. Well, it is applicable, is it not?

Mr. BUTTERS. As a lawyer, I would say that I am not sure it does, Senator. There is a chance that it might.

Senator SPECTER. Well, why not, if you have OSHA bringing an action against an individual and you have HUD bringing an action against an individual?

Mr. BUTTERS. The reason I hesitate, Senator, would be the distinction that the Supreme Court, I believe, has drawn between so-called public rights and private rights, and the OSHA system was characterized as a public right where Congress has decided that

there is a highly technical, special form of problem, such as securities regulation, commodity futures trading regulation, certain aspects of the Federal Trade Commission Act, and the whole other panoply, the Federal Communications Commission.

Senator SPECTER. You are not suggesting we amend this bill to take in the securities problems, are you?

Mr. BUTTERS. No, I am not, Senator, but I am saying that the concept that was, I believe, articulated by the Supreme Court there was that notion of public versus private rights.

I am not convinced—indeed, I do not believe that the issue that is before this subcommittee in dealing with denial of equal housing opportunity really is one of a public right.

Senator SPECTER. Mr. Butters, I would suggest to you that if Congress makes a declaration that it is, my legal judgment would be that it is. But if you require some further opportunity to study that, would you do so and let us have your judgment?

I would find it hard to distinguish a HUD action against an individual defendant from an OSHA action against an individual defendant on a Congressional finding of public policy and public interest. But if you see some legal distinction, I would appreciate it if you would let us know.

Mr. BUTTERS. Thank you.

Senator SPECTER. When you talk about Senator Hatch's bill about strengthening conciliation and provide for a $1,000 attorney's fee where the defendant resists conciliation, how effective is that? How far does that take an attorney? How many hours of your time does it take to utilize $1,000? You can answer any one of that series of questions.

Mr. BUTTERS. Well, our point, Senator, is that $1,000 is better than nothing, and the status today is nothing, and that providing of attorney's fees to a complainant in the event that a respondent refuses to conciliate, in our view, strengthens the process over its current state. Whether it ought to be $1,000, $2,500 or $5,000, I think, is a matter of further discussion.

Senator SPECTER. A final question, Mr. Butters. Do you think that the current enforcement procedures under the fair housing laws are sufficient?

Mr. BUTTERS. We believe that there has not been a demonstrable showing that the federal courts or the State or local courts are incapable of handling these problems. Indeed, as we understand from the testimony of Secretary Pierce, the number of State substantial equivalent acts and the number of local substantial equivalent acts are expanding everyday, and that there are very powerful and, we think, in many respects, more appropriate remedies, and indeed more efficient and quicker remedies available at the State and local level. As far as we understand, those remedies are working.

Senator SPECTER. Well, you say you would at least go along with Senator Hatch's proposition to impose the $1,000 attorney's fee if somebody resists conciliation. So to that extent, the current laws are not adequate, but except for a minor deviation like that, you stand by the efficacy of the current enforcement procedures?

Mr. BUTTERS. Yes, Senator.

Senator SPECTER. How about you, Professor Smolla? Do you think the current act is sufficient on enforcement?

Mr. SMOLLA. Absolutely not. I think that the enforcement procedures that you have built into it, including the administrative law judge mechanism, is probably the preferable mechanism.

You know that you are not home free in a judicial test of that because there are some colorable separation of powers and seventh amendment problems. I think they can all be overcome and I think that if you build a solid legislative record, you can make it close enough to the sort of mechanism that existed under OSHA to sustain a constitutional attack.

Senator SPECTER. No doubt in your mind that if HUD initiates the kind of action we are describing here that it would pass constitutional muster?

Mr. SMOLLA. It is indistinguishable from the OSHA case and I think it is clearly constitutional in that situation.

Senator SPECTER. Thank you very much. Thank you, Senator Kennedy.

Senator KENNEDY. Before we adjourn, I do not think we want to leave the record that Secretary Pierce did not believe that there was a compelling need for a much stronger enforcement mechanism.

I do not know whether Mr. Butters intended to suggest that Secretary Pierce was satisfied with local and State remedies. He was not. No one could read that testimony and think that he was. He may have some differences with us, although I think they are increasingly narrowed as a result of the hearing today, about our administrative law judges.

But there was absolutely no question, having listened to him and having read his testimony, that he thought there was a compelling Federal need for additional kinds of action in the areas particularly regarding the handicapped and on the basis of race; less so, I think I would fairly say, in terms of the family issues.

But there was no question at least in my mind that anyone could hear his testimony and have him believe th[illegible]he local remedies and State remedies are adequate to do the job in this area.

Senator SPECTER. One final question, Professor Smolla. What kind of Pandora's box do you think there would be opened constitutionally if we took an alternative of arbitrators and gave them all of these judicial powers?

Mr. SMOLLA. I think that is a complete dead end. I think that there is no doubt in my mind that there would be instant challenges, and they would probably be successful. Not only that, but symbolically arbitration is a much, much weaker enforcement mechanism. As you pointed out, the Gideon notion is very, very powerful.

Much of the activity of fair housing is a symbolic statement that the United States is behind this policy with teeth and that Federal, professional administrative law judges and Federal courts are behind it.

Senator KENNEDY. The subcommittee stands in recess.

[Whereupon, at 12 p.m., the subcommittee was adjourned.]

FAIR HOUSING AMENDMENTS ACT OF 1987

THURSDAY, APRIL 2, 1987

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:34 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Paul Simon (chairman of the subcommittee) presiding.

Also present: Senators Metzenbaum, DeConcini, and Specter.

Staff present: Deborah Leavy, chief counsel; Jeffrey Robinson, minority chief counsel; Cheryl G. Matcho, chief clerk; Margaret Morton, legislative fellow.

OPENING STATEMENT OF SENATOR PAUL SIMON

Senator SIMON. The subcommittee will come to order.

We are continuing the hearings on S. 558, the Fair Housing Amendments Act of 1987. I might mention, for those of you who may be interested, we just had the vote on the override of the President's veto and, unless some votes have changed in the last 2 minutes, the highway bill was passed over the President's veto.

The question in today's hearing is how we provide the opportunity for decent housing to all Americans. It is not solely decided by this legislation, it is decided also by the kind of economic opportunities that we give to people.

If we pass all possible civil rights legislation but do not give people economic opportunities, the housing opportunity will still not be there.

So we are pleased to have the witnesses here today. I would remind all witnesses that we will put your full statement in the record, and we will limit your informal comments to 5 minutes. We have the light up here; when it turns red, that means your time is up and I will so signal and we will use the remaining time for questions.

I am pleased to welcome on our first panel the Honorable Robert Abrams, the distinguished attorney general of the State of New York, whose reputation is a very good one, not simply in New York but all over this Nation. We are very pleased to have you here today.

Also on this panel, we have Mr. James Morales, of the National Center for Youth Law, and Diana Pearce, the director of the Women and Poverty Project.

Attorney General Abrams, we will hear from you first.

A PANEL CONSISTING OF ROBERT ABRAMS, ATTORNEY GENERAL, STATE OF NEW YORK; JAMES B. MORALES, STAFF ATTORNEY, CENTER FOR YOUTH LAW; AND DIANA M. PEARCE, DIRECTOR, WOMEN AND POVERTY PROJECT

Mr. ABRAMS. Thank you very much, Senator Simon. I appreciate this chance to testify. Seated to my right is Sandy Cohen, assistant attorney general, who is the deputy chief of the civil rights bureau, who shares a good deal of experience in this area.

Nearly 20 years ago, Congress passed the Fair Housing Act of 1968, intending to secure for all the right to buy or rent a home free of discrimination based on race, color, religion, national origin or sex. In S. 558, Congress has the opportunity to strengthen the remedies of title VIII and to reinvigorate the Federal Government's commitment to fair housing.

I would like to address a feature of the bill which is particularly welcome—the addition of a prohibition on discrimination on families with children. Housing discrimination against families with children is all too common. Indeed, a nationwide study by HUD in 1980 reported that between 20 and 25 percent of rental units are in buildings which ban families with children, and that the ban is most common in the newest buildings.

My office's civil rights bureau became alerted to this practice 5 years ago, in the course of working with women's organizations, including battered women's shelters and support groups, children's rights organizations and single parent groups. We received scores of complaints that some landlords simply ban all children from their buildings, while others place restrictions on younger or older children. In large apartment complexes, families with children are often segregated in specific buildings. Some owners actually impose a rental surcharge.

We also learned that rental brokers and agents were complicit in these practices. They frequently will steer families with children away from buildings where the owners do not want them, or will refuse to assist them at all. Landlords and brokers even openly place newspapers advertisements that read "adults only" or "no pets, no children."

In New York City, where the vacancy rate on rental apartments hovers at the 2-percent level, discrimination against families with children is especially cruel. Poor families, who are frequently single parents or minorities, often bear the brunt of this discrimination, because they have fewer resources to find and to pay for apartments where children are accepted.

Housing discrimination against families also contributes to homelessness. In New York, as across the Nation, families with children now comprise 35 percent of the homeless, the single largest group of the homeless population.

In 1982 and 1983, my office commenced investigations and civil enforcement actions against more than 40 landlords and realtors in different cities across the State who were engaged in these pernicious practices. We were able to obtain consent judgments or conciliation agreements requiring these landlords and realtors who controlled access to thousands of apartments to end their discriminatory practices, to provide apartments and pay damages to their

victims, to post signs stating that such discrimination is illegal, not to advertise "adults only" buildings, and to report new rentals and provide business documents to our office.

In addition, the office drafted and proposed a bill which was adopted by the New York Legislature in 1983, creating a private cause of action for victims of this kind of housing discrimination. Under the amended law, an aggrieved individual may sue a landlord to obtain the apartment and to get damages. Reasonable attorneys' fees are also recoverable.

Even though we have stepped up enforcement efforts and we have the creation of a private remedy, housing discrimination against families with children persists in New York. That is why S. 558 is so important.

It not only allows a victim to seek a court judgment to remedy familial discrimination and to obtain attorneys' fees, but equally important, it creates new administrative procedures. These will permit victims to have their claims determined by HUD administrative law judges, whose orders and conciliation agreements can be enforced in a Federal court. HUD itself will for the first time be authorized to undertake enforcement proceedings on its own initiative.

The bill also promotes the involvement of State and local human rights agencies, which is critical in a national enforcement effort.

So, in conclusion, Senator Simon, I think New York's experience demonstrates that discrimination against families with children is a serious and pervasive problem and that strong legislation measures are needed to combat it. I therefore urge passage of S. 558 in order to end practices that are not only widespread but fall most harshly on our most valuable resource in this Nation, our children.

Thank you.

[The prepared statement of Mr. Abrams follows:]

TESTIMONY OF ROBERT ABRAMS
ATTORNEY GENERAL OF THE STATE OF NEW YORK

I want to thank this distinguished subcommittee for giving me the opportunity to testify today in support of S. 558. Nearly 20 years ago, Congress passed the Fair Housing Act of 1968, intending to secure for all the right to buy or rent a home free of discrimination based on race, color, religion, national origin or sex. In S. 558, Congress has the opportunity to strengthen the remedies of Title VIII, and to reinvigorate the federal government's commitment to fair housing.

I would like to address a feature of the bill which is particularly welcome -- the addition of a prohibition on discrimination against families with children. Housing discrimination against families with children is all too common. Indeed, a nationwide study by HUD in 1980 reported that between 20% and 25% of rental units are in buildings which ban families with children, and that the ban is most common in the newest buildings.

My office's Civil Rights Bureau became alerted to this practice five years ago in 1982, in the course of working with women's organizations, including battered women's shelters and support groups, children's rights organizations and single parent groups. We received scores of complaints that parents, - frequently single mothers, were being refused rental apartments because they had children.

In the course of our investigation, we discovered that housing discrimination against families with children takes many forms. Some landlords simply ban all children from their buildings, while others place restrictions on younger or older children. In large apartment complexes, families with children

are often segregated in specific buildings. Some owners actually impose a rental surcharge.

We also learned that rental brokers and agents were complicit in these practices. They frequently will steer families with children away from buildings where the owners do not want them, or will refuse to assist them at all. Landlords and brokers even openly place newspaper advertisements that read "adults only" or "No pets, no children".

In New York City, where the vacancy rate on rental apartments hovers at the 2% level, discrimination against families with children is especially cruel. Poor families, who are frequently single parents or minorities, often bear the brunt of this discrimination, because they have fewer resources to find and to pay for apartments where children are accepted.

Housing discrimination against families also contributes to homelessness. In New York, as across the nation, families with children now comprise 35% of the homeless, the single largest group of the homeless population. It is a problem the dimensions of which cannot be overemphasized.

As early as 1921, New York State prohibited housing discrimination in rental units against families with children by passing a criminal law imposing a small monetary penalty on violators. Unfortunately, section 236 of New York's Real Property Law had been rarely, if ever, enforced by local prosecutors. In 1982 and 1983 my office commenced investigations and civil enforcement actions against more than forty landlords and realtors in New York City, Buffalo, Rochester, Albany, Mt. Vernon and Long Island who were violating section 236. Some of these landlords enforced their discriminatory policies in buildings with hundreds of rental units. By using a state law which empowers the Attorney General to sue persons engaged in persistent illegality in the conduct of their business, we were

able to obtain consent judgments or conciliation agreements requiring landlords and realtors who controlled access to thousands of apartments to end their discriminatory practices; to provide apartments and pay damages to their victims; to post signs stating that such discrimination is illegal; not to advertise "adults only" buildings; and to report new rentals and provide business documents to my office.

In addition, my office drafted and proposed a bill which was adopted by the legislature in 1983, creating a private civil cause of action for victims of this kind of housing discrimination. Under the amended law, an aggrieved individual may sue a landlord to obtain the apartment and to get damages. Reasonable attorney's fees are also recoverable.

Even with our stepped-up enforcement efforts and the creation of a private remedy, housing discrimination against families with children persists in New York. My office continues to receive many individual complaints of discrimination, but we must of necessity focus on those cases where the discrimination has widespread impact. Private rights of action are essential, but many individuals are reluctant to pursue this course, even with the promise of recovery of costs at the end.

This is why S. 558 is so important. It not only allows a victim to seek a court judgment to remedy familial discrimination and to obtain attorneys' fees, but, equally important, it creates new administrative procedures. These will permit victims to have their claims determined by HUD administrative law judges, whose orders and conciliation agreements can be enforced in a federal court. HUD itself will for the first time be authorized to undertake enforcement proceedings on its own initiative.

The bill also promotes the involvement of state and local human rights agencies, which is critical in a national enforcement effort. Administrative complaints filed with HUD would first be referred to certified state or local agencies to take enforcement action within thirty days. Further, within four years after the passage of the bill, state and local agencies must adopt procedural and substantive remedies substantially equivalent to those given HUD, or lose the certification. These provisions will go far toward achieving state and federal cooperation in the campaign to secure equal housing opportunities for all.

In conclusion, New York's experience demonstrates that discrimination against families with children is a serious and pervasive problem and that strong legislative measures are needed to combat it. I therefore urge passage of S. 558 in order to end practices that are not only widespread but fall most harshly on our most valuable resource -- our children.

Senator SIMON. Thank you very much, Mr. Attorney General.
Mr. Morales.

STATEMENT OF JAMES B. MORALES

Mr. MORALES. Thank you, Senator, for inviting me today.

I am a staff attorney at the National Center for Youth Law, located in San Francisco. I have been there for about 7½ years. The center provides assistance to lawyers across the country who represent poor children and families. We provide research assistance and direct assistance in litigation.

I have spent a great deal of time in the past 6 years analyzing the legal remedies that are available to families with children who are denied housing solely because of the presence of children. I have written numerous articles on the subject and litigated several cases in the area.

I am familiar with all of the State laws that currently prohibit housing discrimination against families with children. In analyzing the housing crisis facing families, I have come to the conclusion that this problem is now deeply rooted.

First, the high cost of home ownership has forced many families out of the market for buying a home. As the cost of new housing reaches $100,000, few low-income families and many middle-income families can no longer afford to buy. This high cost forces families to look at housing stock that is relatively lower in cost, such as condominiums, mobile homes and rental units.

Now, if the high cost of home ownership was the only factor facing families with children, perhaps we would not have a housing crisis today, but unfortunately demographic changes have also made families with children a class of undesirables in the housing market.

Over the past 20 years, the number of American households has actually grown at a far faster rate than the population. Today's households are smaller and more diverse, we have a higher proportion of single persons, dual career, female headed and childless families; families with children are thus becoming a distinct minority group in and of themselves.

These demographic changes mean several things. First, more households are competing for housing, especially in the rental market, which has essentially not kept pace with the added demand.

Second, with more and more childless households, landlords and developers have a ready supply of customers that they consider more desirable. Ask any number of landlords about which tenants they would prefer to rent to: a single person, a two-person family, each of whom is making an income, or two persons and a child. In the vast majority of cases, the landlord will select the childless household.

My point in outlining these demographic changes in landlord preferences is that it should be of no surprise when we hear reports of widespread overt policies of discrimination against families with children. As a group of undesirables in a market full of desirable customers, families with children have a significant competitive disadvantage.

The seminal study that HUD commissioned in 1980, "Measuring Restrictive Rental Practices Affecting Families With Children," documented for the first and only time the extent of overt child discrimination throughout the United States. According to the survey, 25 percent of all rental units did not permit children, another 50 percent were subject to restrictions that made it difficult for families to rent.

This HUD commission study demonstrated that overt no-children policies were pervasive, but the extent to which families with children face discrimination is probably much greater than what was reported there. Even when a landlord does not adopt an overt no-children policy, he or she may as a matter of practice consistently select childless households over families with children. The HUD study reported only on the overt practices.

Although the HUD study is 7 years old now, the underlying demographic trends that created the preference for childless households in the housing market remain in effect today. These trends have developed over a long period of time and are not about to change. Children have become a tremendous economic burden and thus fewer families are having children and those that do are having fewer children.

The findings of the HUD study have been confirmed by other reports. In California, where child discrimination has been illegal since 1982, discrimination remains pervasive. The most recent statewide survey of apartments indicated that 40 percent of the rental units were subject to discriminatory policies.

A 1985 survey of mobile home parks in California showed that 76 percent of all the homes were unavailable to families with children because of discriminatory practices.

In Des Moines, IA, a 1985 survey of rental units demonstrated that 33 percent of all the units there did not permit children.

Senator SIMON. Can you conclude your statement, please?

Mr. MORALES. Yes.

Sixteen States and the District of Columbia currently have laws prohibiting child discrimination. A number of these laws have been enacted in the past 10 years. However, many advocates have had a difficult time going against powerful real estate interests who oppose bills that would prohibit housing discrimination against families with children. The result is that the vast majority of States do not have laws and those that do generally have weak and ineffectual laws that are riddled with exemptions which permit discrimination to continue. As an example, Virginia, Arizona, Rhode Island, in their non-discrimination provision actually permit adults only housing complexes to exist. Other States, such as Minnesota, Massachusetts, and Maine, permit significant portions of housing complexes to be adults only.

Some laws, like the one in Illinois, protect families with younger children but do not protect families with older children above the age of 14. Most laws do not apply to rental units and thus do not prohibit discrimination in mobile homes, condos and subdivisions. Most do not prohibit discriminatory advertisements.

Let me conclude by saying that amending the Fair Housing Act to protect familial status would obviously not end child discrimination, but it would, with the addition of the strengthening of admin-

istrative remedies, become one of the strongest fair housing laws for families in the country. Not only would it provide remedies in those States where none exist, but also would close many of the loopholes that currently exist in the State laws and provide further remedies in the Federal courts.

What society can survive that penalizes parents for raising children. With the strong economic disincentives to have children and the actual increase in childless households, the government must take strong action to ensure that those families that decide to have children are protected and have equal access to basic necessities such as housing.

Congress now has the opportunity to reaffirm the societal obligation to insure that the next generation is adequately housed.

Thank you.

[The prepared statement of Mr. Morales follows:]

NATIONAL CENTER FOR YOUTH LAW
1663 Mission Street • 5th Floor
San Francisco, California 94103
(415) 543-3307

John Francis O'Toole
Director
Alice Bussiere
Teresa Demchak
Abigail English
David Lee Lambert
James B. Morales
Carol E. Babichuk
Administrator
Marsha Henry
Newsletter Editor
Rita A. McLennon
Development Director

TESTIMONY OF JAMES B. MORALES,

STAFF ATTORNEY FOR THE NATIONAL CENTER FOR YOUTH LAW,

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

SENATE JUDICIARY COMMITTEE

REGARDING

SENATE BILL NO. 558,

THE FAIR HOUSING AMENDMENTS ACT OF 1987

April 2, 1987
Washington, D.C.

TABLE OF CONTENTS

		Page
SUMMARY		iii
I.	INTRODUCTION	1
II.	FAMILIES WITH CHILDREN FACE A HOUSING CRISIS BECAUSE THE COST OF HOUSING HAS INCREASED DRAMATICALLY IN RECENT YEARS, PROPERTY OWNERS FAVOR HOUSEHOLDS WITHOUT CHILDREN, AND NO-CHILDREN POLICIES ARE PERVASIVE.	2
	A. The High Cost of Home Ownership Has Forced Many Families To Seek Rental Housing.	3
	B. Increased Demand for Rental Units, the Large Number of Childless Households, and Negative Stereotypes of Children Give Families with Children a Competitive Disadvantage in the Housing Market.	3
	C. National Surveys Document the Widespread Existence of No-Children Housing Policies.	6
	D. State and Local Studies Demonstrate that Age-Restrictive Housing Policies are Pervasive.	10
	E. Subtle Forms of Discrimination Against Families with Children Are More Common than Blanket Exclusionary Practices.	16
	F. Age-Restrictive Housing Practices Have A Racially-Discriminatory Effect.	
III.	THE CURRENT LEGAL REMEDIES FOR HOUSING DISCRIMINATION AGAINST FAMILIES WITH CHILDREN ARE INADEQUATE.	23
	A. The Sixteen State Laws That Prohibit No-Children Housing Policies Are Riddled With Exceptions and Provide Limited Remedies.	23

Page

B. Federal Remedies for Housing Discrimination Against Families with Children Are Dependent on Difficult Evidentiary Burdens. 31

IV. CONCLUSION 34

SUMMARY OF TESTIMONY

Almost forty years ago, Congress established the goal of a decent home and suitable living environment for every American family. This goal has not yet been fulfilled. in fact, we seem to be slipping farther away from it. Congress has also enacted various pieces of legislation in efforts to strengthen the family, perhaps the most fundamental social institution of our society. These two broad themes--the provision of decent housing and protection of the familiy--underlie those provisions of Senate Bill No. 558 that would include "familial status" as a protected class under the Fair Housing Act.

Amending the Fair Housing Act to protect families with children from housing discrimination is necessary because of the housing crisis facing many families today. There are several aspects to this housing crisis. First, the high cost of home ownership now precludes most low-income, and many middle-income, families from fultilling the American dream of owning a home. Second, as families turn to rental housing, they are finding high rents and low vacancy rates, especially for those units that are large enough to accommodate a family with children. Third, families with children must compete for scarce housing with other households that landlords find more desirable e.g. single persons, dual career families, and childless couples. These smaller, childless households are increasing in number in the United States. Fourth, given the increase in childless households, landlords do not have to rent to families with children to ensure the financial success of their businesses. Landlords thus select childless households over families with

children, adopt no-children policies, and engage in other practices that adversely affect families. Some of these practices include unnecessarily strict limitations on the number of occupants per unit, excessive surcharges for additional occupants, and the segregation of families with children in certain units of an apartment complex.

A 1980 HUD-commissioned survey of the rental market in the United States demonstrated that housing discrimination against families with children was pervasive. Twenty-five percent of all rental units in the survey did not allow children; another fifty percent were subject to policies that somehow limited families' access to the units. Of the families with children in the survey, fifty percent had recently experienced difficulty in finding housing and twenty percent were living in less desirable housing because of exclusionary policies. This 1980 survey is the only national report on the extent of housing discrimination against families. Its findings remain valid because the survey itself found that child discrimination had increased over time and because no current evidence exists to refute the logical assumption that this discimination continues. In fact, several reports from localities around the country confirm that housing discrimination against children remains a problem.

In California, child discrimination in rental units was prohibited in 1982. Yet, in 1983, 40 percent of a sample of apartment buildings in one city had discriminatory policies against children; in 1984, a statewide survey showed that almost 40 percent of landlords discriminated against children; and in

1985, 76 percent of all mobile home park spaces in the state excluded children.

Other states and localities have reported that child discrimination is a significant problem. The State of Connecticut recently found that families with children continue to be the victims of overt discrimination in spite of a 1981 law. A 1985 survey of 96 landlords who control over 11,000 rental units in Des Moines, Iowa found that 48 percent of the landlords, representing 33 percent of the total units, did not permit children. In Alexandria, Virginia, only 9 percent of the city's rental units accept children without restrictions. In the Florida counties of Orange and Seminole, 36 percent of the rental vacancies do not allow children.

Although child discrimination affects all groups and income classes, black, Hispanic and other racial and ethnic minority families are disproportionately affected by housing policies excluding children. These families are much more likely to have children in the household and therefore, adults-only housing excludes a larger proportion of racial and ethnic minority families than of other families. Moreover, adults-only housing tends to be located in predominantly white areas of metropolitan areas and thus tends to perpetuate racially-segregated patterns of housing.

The vast majority of states provide no remedies for housing discrimination against families with children. Only 16 states prohibit this discrimination. Unfortunately, even these remedies are weak measures to prevent age-restrictive housing. Most of them have limited applicability, major loopholes, and incomplete

enforcement mechanisms. Typically, the state child discrimination laws are not part of the comprehensive fair housing law and thus do not have the panoply of definitions and remedies that the other nondiscrimination provisions have. Some of the state laws prohibit discrimination and then eviscerate the protection by permitting adults-only policies. The state laws of Virginia, Arizona, Rhode Island, Minnesota, Massuchesetts, Maine, Michigan and New Hampshire have exemptions that permit housing complexes or sections of housing complexes to be all-adult. (This criticism of state law exemptions does not pertain to senior-citizen housing, which is a legitimate exception to nondiscrimination law.) Most of the state laws cover only rental units; a few permit discrimination against older children.

Two federal appellate courts have held that victims of child discrimination may have claims under existing federal law. These claims are limited because they rely either on the skillful use of statistics to prove racial discrimination or on the existence of state action to establish a constitututional violation. Consequently, federal law does not currently provide a remedy to most victims of housing discrimination against families with children.

I. INTRODUCTION

Thank you for inviting me to give testimony in support of provisions of Senate Bill No. 558 that would create federal remedies for housing discrimination against families with children. I am delighted to have this opportunity to present the case for expanding the Fair Housing Act to include "familial status" as a protected class.

I have been a staff attorney at the National Center for Youth Law for the past seven and one-half years. The Center is a nonprofit organization located in San Francisco, California. It provides consultation and advice to lawyers across the country and engages in civil litigation on behalf of poor families and children. The Center's lawyers specialize in the areas of foster care, abuse and neglect proceedings, public benefits, special education, juvenile corrections, health care and housing.

For the past five years, I have specialized in fair housing law for families with children. I have litigated numerous cases challenging housing discrimination against families with children, written several articles on the subject, trained lawyers and other professionals on available remedies, and responded to hundreds of requests for assistance from lawyers whose clients were denied housing because of age-restrictive policies. My resume is attached as Exhibit 1.

In this written statement, I will demonstrate that housing discrimination against children is prevalent throughout the

United States, that the current legal remedies on the state level are ineffective, and that national legislation is necessary to avoid a patchwork of inconsistent and conflicting state and local laws.

II. FAMILIES WITH CHILDREN FACE A HOUSING CRISIS BECAUSE THE COST OF HOUSING HAS INCREASED DRAMATICALLY IN RECENT YEARS, PROPERTY OWNERS FAVOR HOUSEHOLDS WITHOUT CHILDREN, AND NO-CHILDREN POLICIES ARE PERVASIVE.

A. The High Cost of Home Ownership Has Forced Many Families To Seek Rental Housing.

In recent years, low and middle income households in the United States, especially those with children, have faced a housing crisis. The exorbitant costs of owning a home, high rents, low vacancy rates, and significant reductions in subsidized housing have created a nightmare for many families who struggle to find housing. Given that the average cost of a new single-family home is now close to $100,000,[1] the American dream of owning one's own home remains unfulfilled for many people. The trend toward home ownership that occurred during the sixties and seventies has now stopped. In fact, in recent years the home ownership rate among low income, minority and central-city households has decreased. [2]

As more and more households are forced to rent, they have found that the costs of rental housing have dramatically

---

[1] C. Hartman (ed.), America's Housing Crisis: What Is To Be Done?, (1983).

[2] J. Zais, The Housing of Families with Children: Basic Trends in R. Nelson and F. Skidmore, American Families and the Economy, 193 (1983).

increased in recent years. An increasing number of renters are spending an inordinate amount of their income on housing costs. For example, 53 percent of all renters pay 25 percent or more of their income for housing; 34 percent of all renters pay 35 percent of their income. Those with the lowest incomes spend the highest proportion of their income on shelter.[3]

B. Increased Demand for Rental Units, the Large Number of Childless Households, and Negative Stereotypes of Children Give Families with Children a Competitive Disadvantage in the Housing Market.

Low income is of course a major factor in many families' difficulties in obtaining adequate housing. However, for the thirty million households that have children under the age of eighteen--40 percent of all households in the United States--the presence of children, in and of itself, creates substantial problems in finding decent and affordable housing. First, vacancy rates for large units--those most suitable for families with children--have decreased.[4] Second, families with children must compete for housing with childless households which are the preferred customers in the housing market. Third, landlords

---

[3] C. Hartman (ed.) at 17. According to this same report, in 1970, only two-fifths of all renter households were paying 25 percent or more of their income for housing and only one-fourth were paying 35 percent or more. Id. See also W. Rumpf, The Outlook for Rental Housing: A Worsening Problem at 4 (1981) ("Both the proportion and absolute number of renters paying an excessive share of income for rent have been increasing.")

[4] The nation-wide vacancy rate for rental units with three or more bedrooms has dropped to approximately 3.5%. The number of one-unit structures for rent--those most likely to have a sufficient space to accommodate large families--has also declined. J. Zais at 195.

increasingly refuse to rent to families with children or they adopt policies that effectively exclude many families.

The reasons underlying the decline in the availability of large units and landlords' preference for households without children are actually interrelated. Recent demographic changes in the United States indicate that households are smaller and have a higher proportion of single persons, dual career families, female heads of households, and childless couples.[5] With household size decreasing and childless households increasing, developers and landlords do not have to respond to the demands of families with children to make their businesses financially successful. Instead, developers can build houses and apartments with fewer bedrooms and less square footage; landlords can refuse to rent to families with children or impose other policies that severely restrict the number of children in units.

The providers of housing treat families with children as the least desirable customers. Some landlords believe that renting to families with children causes higher maintenance costs and problems with noise and unsupervised children.[6] Little objective evidence, however, exists on the relationship between operating costs and renting to families with children. One study

---

[5] E. Birch, The New American Demography: Housing and Planning, Journal of Planning Education and Research (April 1985).

[6] R. Marans, M. Colten et al., Measuring Restrictive Rental Practices Affecting Families with Children: A National Survey (1980). (Four in five managers responding to this survey viewed maintenance as a problem with families with children.)

has concluded, after an exhaustive search, "that there is no empirical data which compares maintenance costs in buildings which do and do not allow children".[7] On the general issue of operating costs, this same study found that "the insurance industry, with its enormous amounts of data on claims, does not consider the presence of children a significant factor in setting rates for apartment buildings."[8]

Some landlords also believe that childless households prefer not to live in close proximity to children.[9] Given that adults-only housing causes significant problems for families in finding housing, tenant preference to exclude children should not legally or morally justify these policies. Tenant preference regarding the color of a neighbor's skin has long been rejected as a permissible reason for discriminatory housing practices.[10]

Even if a landlord could show that some households with children caused more maintenance problems, created too much

---

[7] D. Ashford and P. Eston, The Extent and Effects of Discrimination Against Children in Rental Housing: A Study of Five California Cities at 36 (Dec. 1979). See also Marina Point Ltd. v. Wolfson, 30 Cal.3d 721, 180 Cal.Rptr. 496, 640 P.2d 115 (1982) where, in declaring adults-only housing illegal, the California Supreme Court recognized expert opinion that the basic profitability of operating an apartment complex does not generally vary with the age of its tenants.

[8] Id. at 37.

[9] R. Marans, M. Colten et al, at 55. (Forty percent of the renters without children who live in adults-only housing and who responded to this survey stated that there were reasons why they prefer not to live near children.)

[10] See e.g. Steele v. Title Realty Co., 478 F.2d 380 (10th Cir. 1973)

noise, or left children unsupervised, the landlord has effective ways of dealing with these problems. First and foremost, the landlord has the right to choose applicants for housing on the basis of individual characteristics. Even the most stringent nondiscrimination law preserves and promotes this right. Accordingly, a landlord does not have to rent a unit to a particular household with a history of causing excessive damage to rental property or of violating rules. Second, a property owner has the right to adopt and enforce reasonable standards for tenants' conduct and to be compensated for damages when the tenants violate those standards. Ultimately, the landlord has the authority to evict the tenants. The exclusion of an entire class of households--those with children--is thus an extreme measure that is not necessary to protect the property owner's interests.[11]

C. National Surveys Document the Widespread Existence of No-Children Housing Policies.

In 1980, the Department of Housing and Urban Development commissioned researchers to conduct two separate studies on housing discrimination against families with children. Both of these studies were prepared for HUD's Office of Policy Development and Research. One study measured the extent of exclusionary policies against families with children by using a

---

[11] "Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 708 (1978).

national probability study of rental housing units and of the owners or managers of these units. R. Marans, M. Colten, et al., Measuring Restrictive Rental Practices Affecting Families with Children: A National Survey (1980) [hereinafter "HUD National Survey"].[12] The other study measured the experiences of families with children that had recently encountered discrimination. It used reports from individuals who responded to public service announcements that were broadcast in six metropolitan areas. J. Greene and G. Blake, How Restrictive Rental Practices Affect Families With Children (1980) [hereinafter "Restrictive Rental Practice"]. Both studies found that housing discrimination against children created significant barriers that confronted families in their search for housing.

The HUD National Survey found that 25.5 percent of all rental units did not allow children. Another 50 percent of all units were subject to restrictive policies that limited the ability of many families with children to live in those units. HUD National Survey at 27, Table IV-3.[13]. Among these restrictive policies were limitations on the number of children

---

[12] This study was based on a national telephone survey with 1007 renters and 629 managers.

[13] One commentator has suggested that the HUD National Survey underestimates the extent of discrimination because it only reports overt exclusion and does not report those cases where landlords merely choose to rent to childless households instead of families with children. G. Schober, Exclusion of Families with Children from Housing, 18 Univ. of Mich. J. of Law Reform 1121 (1985).

who could occupy an unit, limitations on the number of units in an apartment complex where families with children could reside, age requirements that children be over or under a certain age, and prohibitions on children of the opposite sex sharing the same bedroom. As will be discussed below, these and other restrictive policies that do not exclude all children continue to be a major problem even in those states that have adopted fair housing laws for families with children.

The HUD National Survey also found that many of the renter households in its survey had experienced age-restrictive policies when they last looked for housing and that many of them were forced to accept housing that was less desirable because of these policies. One-half of the families with children in the survey had recently encountered difficulty because of discriminatory policies. HUD National Survey at 51-52, Table V-2. The widespread discrimination against children led many families to select housing with which they were not satisfied.

> As a consequence of exclusionary practices, almost one-fifth (19.7 percent) of all the families with children in the sample are living in homes they consider to be less desirable. The situation is even more extreme for families with three or more children in the household. Almost 30 percent of all of the families with three or more children reported that they have had to settle for a less desirable home. [emphasis in original]
>
> Id. at 53

A significant percentage of families with children also believed that they were forced to reside in a less desirable neighborhood or location because of discriminatory policies against children. Id. at 52, Table V-2.

The other HUD study, How Restrictive Rental Practices Affect Families with Children, confirmed that age-restrictive housing policies adversely affected families with children in a variety of ways. Ninety-nine percent of the respondents in that study reported numerous problems that they attributed to housing discrimination against children. Restrictive Rental Practices at 2. Of that group, 55.1 percent had searched for housing for over nine weeks. Id. at 14. Forty-seven percent reported living in substandard conditions. Id. at 16. Twenty-two percent complained about being forced to move. Id. at 19. Thirty-nine percent complained about living in overcrowded conditions. Id. at 20. Nineteen percent stated that family members had to live separately during part of the past year. Id. at 22. Included in this last group were a large majority of cases where children were sent to live with relatives, while their parents lived in adult complexes and continued to look for other housing. Other complaints included being forced to live in housing far from work or school and experiencing emotional problems and depression because of the housing difficulties. Id. at 23-35.

Although these two studies are now seven years old, their findings about the nature and extent of housing discrimination against families with children remain valid. The HUD National Survey strongly suggests that child discrimination is a trend that is increasing over time. The researchers asked the managers of apartment buildings about the year in which their exclusionary policies were adopted. From their responses, the study found

that "16.7 percent of all units in 1974 excluded children while in 1980 25.5 percent of all units allow no children....This substantial increase holds for units of all different sizes." [footnote omitted] HUD National Survey at 46. No evidence exists to refute the logical assumption that this trend in age-restrictive housing patterns has continued since 1980 in those locations where child discrimination is legal.[14] In fact, a 1985 nation-wide survey of fair housing agencies that handle complaints of discrimination found that nearly 90 percent of the respondents described housing discrimination against families with children as severe and that 59 percent characterized it as very severe.[15]

D. State and Local Studies Demonstrate that Age-Restrictive Housing Policies are Pervasive.

The findings of these national studies have been confirmed and supplemented by a number of other reports about housing practices across the country. In particular, several studies from California are quite informative because of the history of child discrimination there, the judicial and legislative efforts

---

[14] Since 1980, seven states have adopted laws that prohibit some form of housing discrimination against children: California, Connecticut, Maine, Minnesota, Rhode Island, Vermont, and Virginia. Even in those states where state law prohibits age-restrictive housing policies, discrimination continues. For example, a report from California demonstrated that three years after adults-only housing became illegal, thirty-nine percent of the landlords in a state-wide survey imposed discriminatory restrictions on families with children. See footnote 19 and accompanying text.

[15] Statement of Martin E. Sloane, NCDH Executive Vice President at 2 (Oct. 23, 1985).

78-076 O - 88 - 7

to prohibit child discrimination, and the continuing problem of age-restrictive practices.

A 1979 survey of major cities in California found pervasive discrimination against children. In Los Angeles, San Jose, San Diego and Fresno, 71 percent, 70 percent, 65 percent and 53 percent, respectively, of the rental units in those cities did not rent to families with children.[16] Moreover, this study found that rents were generally higher for units that allowed children in comparison to equivalent adults-only units, that renters with children were inadequately housed more often than childless households and that families of all sizes and incomes faced significant and similar barriers in finding adequate housing that was available to children. More recent surveys of the California housing market indicate that in spite of a 1982 court decision[17] prohibiting child discrimination in housing, a significant number of landlords refuse to comply with the law.

---

[16] D. Ashford and P. Eston, The Extent and Effects of Discrimination Against Children in Rental Housing: A Study of Five California Cities (Dec. 1979).

[17] In February 1982, the California Supreme Court ruled that adults-only rental housing violated a state civil rights laws that prohibited arbitrary discrimination. Marina Point Ltd. v. Wolfson, 30 Cal.3d 721, 180 Cal.Rptr. 496, 640 P.2d 115 (1982). A year later, the court expanded on its earlier ruling and prohibited adults-only condominiums. O'Connor v. Village Green Owners Association, 33 Cal.3d 790, 191 Cal.Rptr. 320, 662 P.2d 427 (1983). In 1984, the California legislature enacted statutes that codified and clarified these judicial decisions. Cal. Civ. Code §§ 51.2 & 51.3. See J. Morales, California Moves to Clarify Court Decisions Banning Adults-only Housing: Legislature Defines Exemption for Senior-citizen Housing, 5 Youth Law News 3 (Nov.-Dec. 1984).

A report in March 1983, a year after adults-only rental housing was declared illegal, found that 40 percent of a sample of apartment complexes in Sacramento, California engaged in differential and discriminatory treatment toward families with children.[18] The most common form of discrimination was the restriction of families with children to certain units or sections of an apartment complex. Other reported practices included misrepresentation of the availability of the unit, discouragement of families with children from applying, and limitations on the number of children per apartment. A 1984 survey of landlords in eleven major cities throughout California found that 39 percent of the landlords either excluded children or imposed discriminatory restrictions on children.[19]

In 1985, a California state agency surveyed the 5,812 mobile home parks in the state. Fifty-six percent of all mobile home

---

[18] Human Rights/Fair Housing Commission of the City and County of Sacramento, Discrimination Against Families With Children in the Sacramento Rental Market: Audit and Assessment (March 1983).

[19] In this unpublished survey by the Department of Fair Employment and Housing, 12 percent of the 866 apartments excluded children and another 27 percent placed discriminatory restrictions on children. "Anti-children Bias Illegal But Common in L.A. Apartments," Los Angeles Times, part II, p. 1 (March 4, 1985). This article also describes a survey of 20 apartments in the Los Angeles area. Of these apartments, 8 accepted children, 2 excluded children, 1 claimed no vacancy even though a later inquirer without children was told that an apartment was available and 9 discouraged families with children from applying. Id. at 3.

parks did not permit families with children.[20] More significantly, large mobile home parks--those with 100 or more spaces--were more likely to exclude children. Seventy-three percent of the large parks did not permit children. The agency also analyzed the extent of discrimination by looking at the total number of spaces in parks--estimated at 367,000 to 388,860. Under this analysis, 76 percent of all spaces in the state's mobile home parks were unavailable to families with children.[21] At a time in California when many families cannot afford to buy traditional single family dwellings, discriminatory policies in mobile home parks prevent them from living in this relatively inexpensive housing.[22]

The California experience demonstrates that the existence of a state law prohibiting housing discrimination against

---

[20] Department of Housing and Community Development, Mobilehome Parks in California: A Survey of Mobilehome Park Owners Pursuant to SB 1835 (February 1986). The California Supreme Court currently has two pending cases in which the legality of adults-only mobilehome parks is being challenged. Schmidt v. The Superior Court, No. LA 32110, review granted, Sep. 25, 1985; Dubreuil v. West Winds Mobile Lodge, No. LA 32095, review granted, Aug. 15, 1985.

[21] Preserving mobilehome parks for senior citizens does not explain the widespread exclusion of children from California mobile home parks. Only 14% of the parks and 18% of the spaces are restricted to persons 55 years of age and older. Id. at 31.

[22] The median price of a mobile home in California is $17,000 for a new single-wide unit and $33,000 for a double-wide unit. The state-wide average rent for a space in a mobile home park is $198 per month. Using this data, the Department of Housing and Community Development concluded that "existing parks are affordable to sizable segments of the 50% to 100% of median income target group in most areas of the state". Department of Housing and Community Development, Incentives for Family Mobilehome Parks at 6 (June 1986).

families with children is not sufficient to stop exclusionary practices. Additional remedies at the federal level are also necessary.

Although California has been in the forefront in investigating the extent of child discrimination in housing, other concerned individuals in communities across the country have monitored this problem and also found pervasive discrimination. A recent survey of ninety-six landlords who control over 11,000 rental units in Des Moines, Iowa found that 48 percent of the landlords, representing 33 percent of the total units, did not permit children. Only a few of the landlords rented to families with children without any restrictions. The most common restriction was limiting the number of children permitted in a unit. Another common practice was restricting families to certain buildings or floors of a complex.[23]

Other reports from around the country indicate that child discrimination is not an isolated problem. The State of Connecticut recently conducted hearings throughout the state on housing discrimination and concluded that, in spite of a 1981 nondiscrimination law, "families with children are overtly and illegally discriminated against".[24] In Irving, Texas, a suburb of Dallas, only 13 of the 40 apartment complexes built there

---

[23] R. Burke, A Report on Discrimination against Children in Des Moines Rental Housing (September 1985) (prepared for the Des Moines Community Housing Resource Board).

[24] The Connecticut Commission on Human Rights and Opportunities, Housing Discrimination and Opportunities in the State of Connecticut at 18 (April 1986)

since 1983 accept families with children.[25] In Alexandria, Virginia, only nine percent of the city's rental units accept children without restrictions.[26] In the Florida counties of Orange and Seminole, 36 percent of the rental vacancies do not allow children.[27] In Dallas, Texas, a study showed that 52% of the units within the central city prohibit children and an additional 12% have restrictions as to the number and age of children accepted.[28] There have been reports that 75 percent of the rental units in the area of Cleveland, Ohio restrict children and that only 25 percent of the rental units in Norman, Oklahoma are available to families with children without restrictions.[29] In Atlanta, Georgia, 25 percent of large

---

[25] "Apartment Hunting Complex with Kids," Irving Daily News, at 1 (October 25, 1985). Those complexes that do accept children impose restrictions such as no children over a certain age and segregation of families in a small section of a complex.

[26] "Landlords' 'No-Children' Policies Frustrate Parents Seeking Housing", Wall Street Journal, section 2, p. 35 (October 16, 1985).

[27] "Children--The New Outcasts: Adults-only housing is changing the way America lives", The Orlando Sentinel (October 18, 1984).

[28] J. Greene, An Evaluation of the Exclusion of Children from Apartments in Dallas, Texas (J.G. & Associates, Inc., 1978). See also J. Greene, Child Discrimination in Rental Housing: A Comparative Analysis of Apartment Policies in Dallas, Texas Regarding the Acceptance of School-Aged Children to Area, Vacancy, Price and School District. (J.G. & Associates, Inc. 1979).

[29] American Planning Association, Housing Discrimination against Families with Children: Documentation of examples of discrimination and bibliography (May 1984).

apartment complexes do not rent to families with children.[30] A much greater barrier to families in Atlanta is overly-restrictive occupancy standards, that is, unnecessary limitations on the number of individuals in an apartment. The most common occupancy standard among these apartments was one child per bedroom.

E. Subtle Forms of Discrimination Against Families with Children Are More Common than Blanket Exclusionary Practices.

Even where no overt policy excludes or restricts families with children, landlords routinely discourage families with children from renting, misrepresent unit availability, or merely rent to other tenants who do not have children. The above-mentioned Atlanta study highlights the fact that discriminatory practices which impede a family's access to housing are not always overtly exclusionary. Furthermore, the HUD National Survey demonstrates that the majority of age-restrictive housing practices do not automatically exclude all children but instead create certain barriers for families with children which are not encountered by childless households. Where these practices exist, families with children may in fact reside in the apartment building but the overall number of families is kept artificially low. Examples of these practices include: unnecessarily strict

---

[30] C. Reid, A. Keiting, and L.Long, Patterns of Discrimination Against Children in Rental Housing in the Metro-Atlanta Area (1979)

limitations on the number of occupants per unit,[31] limitations on the age, sex, and number of children per bedroom,[32] surcharges for additional occupants,[33] rules that segregate families with children into specified units,[34] and rules that require

---

[31] See J. Morales, Landlords Find New Ways to Discriminate Against Children: Restrictive Occupancy Standards, 7 Youth Law News 1 (March-April 1986), summary reprinted, 20 Clearinghouse Rev. 152 (June 1986). See also Commission on Human Rights and Opportunities v. Hillcroft Partners, No. 8520090 (Ct. Com. on Human Rights., Feb. 28, 1986) (Policy of no more than four persons in three bedroom apartment violates child discrimination law), discussed at 20 Clearinghouse Rev. at 153; Park Redlands Covenant Control Committee v. Simon ____ Cal.App.3d ____, 226 Cal.Rptr. 199 (1986) (Policy of three persons per dwelling violates rights to live with family members).

[32] See R. Burke, A Report on Discrimination against Children in Des Moines Rental Housing (Sep. 1985); C. Reid, A. Keiting, and L.Long, Patterns of Discrimination Against Children in Rental Housing in the Metro-Atlanta Area (1979); Carson v. Pierce, 546 F.Supp. 80 (E.D.Mo. 1982), aff'd on other grounds, 719 F.2d 931 (8th Cir. 1983) (Challenge to policy of two children per apartment does not state cause of action).

[33] An example of a discriminatory rent surcharge is based on a request for assistance that I received. In the case, a landlord listed a 3 bedroom apartment for $450.00 but limited occupancy to 1 or 2 persons unless the tenants paid an additional $50.00 rent for each additional person. A couple with two small children was interested in the unit but could not afford to pay the rent surcharge of $100.00 for their two children. The $50 surcharge would be excessive if the landlord could not show that the surcharge was necessary to offset increased costs caused by the additional occupant.

[34] See Human Rights/Fair Housing Commission of the City and County of Sacramento, Discrimination Against Families with Children in the Sacramento Rental Market: Audit and Assessment (March 1983) (Age-segregated units was most common form of discrimination); J. Morales, Michigan Supreme Court Skirts Ruling on Child Bias in Housing, 6 Youth Law News 1 (May-June 1985), analyzing Department of Civil Rights v. The Beznos Corp., 421 Mich. 110 (1984) (Set-aside of 36 out of 928 units for families with children does not violate state civil rights law.)

unreasonable supervision of children.[35]

These subtle discriminatory policies not only prevent families from renting in the first place, but also provide grounds for evicting families after they have managed to find a place to live. For example, landlords have sought to evict families after the birth of a child because the size of the family then exceeds the number of occupants that is stated in the lease.[36] In many instances, the specified number of occupants is lower than what legal or professional standards would require to prevent overcrowding. Eviction under these circumstances can cause great hardship to a family that is already coping with the addition of a new family member.

F. Age-Restrictive Housing Practices Have a Racially-Discriminatory Effect.

Adults-only housing policies disproportionately and

---

[35] An example of a restrictive rule also comes from requests for assistance that I have received. A landlord adopted a rule that parents must supervise their children in all common areas of the apartment complex. A parent of a 13 year old found it impossible to follow her child around the premises and thus violated the rule. The landlord informed her that she had to move because of repeated violations of the rule.

[36] See e.g. Gonzalez v. Swiftwood Corp., No. 90214 (California Superior Court for Ventura County, filed Nov. 27, 1985) (A landlord attempted to evict a family of two adults and two children from a two bedroom apartment because newly-born child put family size over occupancy policy of not more than three persons in a two bedroom apartment.); Clark v. Shepard, No. 73651 (Cal. Superior Ct. for County of Placer, filed November 27, 1985) (A family of five is being evicted after new owners of an apartment complex imposed an occupancy limitation of no more than four persons in a two bedroom apartment.); Aslan v. Acco Management Co., No. P42377 (Cal. Superior Court for County of Santa Clara, filed January 4, 1983) (A couple were forced to move after birth of child because the apartment complex had a policy of one person per bedroom for two bedroom apartments.)

adversely affect racial and ethnic minority families in at least two ways: 1) Black, Hispanic and other minority households are significantly more likely than white families to have children; therefore, age-restrictions have the potential of denying housing to a larger proportion of the minority households than of the white households. 2) Adults-only housing tends to be concentrated in newer developments that are in predominantly white areas; therefore, the existence of no-children policies forces minority households with children into non-white areas and thus reinforces racially-segregated patterns of housing.

Without exception, census data from states and metropolitan areas demonstrate how the exclusion of children from housing disproportionately affects minority families. As an example, the data for California indicates that 69 percent of the families designated as of Spanish origin and 62 percent of Black families have children, whereas only 51 percent of white families have children.[37] This data is available for other states and for every Standard Metropolitan Statistical Area (SMSA) in the country.[38] For example, the report for the Fresno area of California shows that while 46 percent of the white family households have children, 70.9 percent of the Hispanic, 64.5

---

[37] U.S. Bureau of Census, General Population Characteristics (part 6-Cal.) 52 (1981)

[38] The National Technical Information Service provides a report describing census data for each SMSA. This report is entitled Report 3: Social Indicators for Planning and Evaluation-1980 Census of Population and Table 5 is a compilation of data on family households that is cross-tabulated by race and national origin, as well as by the presence of children.

percent of the black, 55.5 percent of the Native American and 49.9 percent of the Asian family households have children.[39] These numbers are not unique. In each locality, the numbers are similar.

The importance of this data is that it demonstrates that age-restrictive housing policies "operate as 'built-in headwinds' for minority groups".[40] A well-established principle of civil rights law is that an unjustified, facially-neutral policy which disproportionately and adversely affects racial and ethnic minorities constitutes unlawful discrimination.[41] Age-restrictive housing practices adversely affect Black and Hispanic households because, as shown above, these groups are much more likely than other families to have children. At least two courts have considered this adverse impact and have held that adults-

---

[39] Detailed census information is also available on computer tapes that can further analyze the characteristics of households in a given area by income and renter status. The "Public-Use Microdata Samples" usually consist of a sample of five percent of the households in an SMSA. In response to a request for assistance, the National Center for Youth Law had the tape run for Las Vegas, Nevada SMSA. Among other things, the data showed that 8.9 percent of the white households were renters who had children whereas 26.4 percent of the Black and 21.7 percent of the Hispanic households were similarly situated.

[40] Griggs v. Duke Power Co., 401 U.S. 424 (1971) (Facially-neutral standards that exclude a disproportionate number of minorities constitute racial discrimination).

[41] See J. Morales, Use of the Fair Housing Act to Redress Housing Discrimination Against Families with Children, 17 Clearinghouse Rev. 736 (Nov. 1983)

only housing states a claim of race discrimination.[42]

Other studies confirm the racial impact of adults-only housing. Using interviews of renters with children from nineteen metropolitan areas, one HUD-commissioned study concluded:

> Among the respondents...,minorities were the most heavily burdened by serious problems caused by restrictive rental policies. The severity of their burden may be the result of insufficient income. However, even among those with incomes of $15,000 and above, a statistically significant difference was found between the frequency of serious problems experienced by minority complainants and those experienced by white complainants. This raises the question as to whether at times no-children policies are a smoke screen for racial discrimination.[43]

The study of Atlanta apartment buildings concluded that the practice of limiting the number of children that could live in an apartment adversely affected racial and ethnic minority households:

> Blacks and other minorities tend to have larger families, so this type of restriction serves to maintain already existing patterns of racial

---

[42] Betsey v. Turtle Creek Associates, 736 F.2d 983 (4th Cir. 1984); Halet v. Wend Investment Co., 672 F.2d 1305 (9th Cir. 1982). See also J. Morales, Recent Fair Housing Act Litigation: Betsey v. Turtle Creek Associates, 18 Clearinghouse Rev. 640 (Nov. 1984).

[43] J. Green and G. Blake, How Restrictive Rental Practices Affect Families with Children at 3-4 (1980). See also W. Rumpf, The Outlook for Rental Housing: A Worsening Problem at 10 (1981) ("[A]dults-only rental practices add an onerous burden for minorities with children who experience the cumulative barriers of lower relative income and the persistence of race discrimination in the sale and rental of housing.")

segregation between north and south Atlanta.[44] This study touched on another, significant aspect of age-restrictive housing policies: that they perpetuate patterns of racially-segregated housing discrimination.

A series of studies have found that age-restrictive housing policies are often concentrated in predominantly white areas and in newer buildings. In particular, the HUD National Survey concluded that "[u]nits in predominantly white neighborhoods are more likely than rental units in predominantly black neighborhoods to restrict families with children (28.9 percent versus 17.5 percent)." Id. at 34.[45] The HUD National Survey also found that age limitations are also greater among recently built units. Id. at 44. The concentration of age-restrictive policies in largely white areas reinforces racially-segregated housing patterns.

Finally, by limiting the housing opportunities available to minority families with children, these policies serve to exacerbate the already dismal conditions in which many minority

---

[44] C. Reid, A. Keating & L. Long, Patterns of Discrimination Against Children in Rental Housing in the Metro-Atlanta Area at 4 (1979)

[45] See also, C. Reid, A. Keating & L. Long, Patterns of Discrimination Against Children in Rental Housing in the Metro-Atlanta Area (1979) (43.7 percent of adults-only rental units located in predominantly white sections of Atlanta, while only 6.4 percent located in minority areas); J.G. & Associates, Child Discrimination in Rental Housing: A Comparative Analysis of Apartment Policies in Dallas, Texas Regarding the Acceptance of School-Aged Children (1979) (68 percent of all adults-only units located in predominantly white areas, while 11 percent located in minority areas.).

households are forced to live. For example, as one study has found, minority families with children are "inadequately housed at nearly twice the rate as the population as a whole, and at more than twice the rate for whites."[46]

III. THE CURRENT LEGAL REMEDIES FOR HOUSING DISCRIMINATION AGAINST FAMILIES WITH CHILDREN ARE INADEQUATE.

A. The Sixteen State Laws That Prohibit No-Children Housing Policies Are Riddled With Exceptions and Provide Limited Remedies.

Most families with children in the United States have no effective legal remedy when they are denied housing because of age-restrictive housing practices. Only sixteen states[47] and the District of Columbia prohibit housing discrimination against families with children.[48] These laws vary tremendously: some provide only minimal coverage and relief for discrimination. Moreover, as the experience in California demonstrates, the

---

[46] Children's Defense Fund, Portrait of Inequality: Black and White Children in America at 107, Table 52 (1980).

[47] Arizona, California, Connecticut, Delaware, Illinois, Maine, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New York, Rhode Island, Vermont, and Virginia. Additionally, Alaska law states as its purpose: "to eliminate and prevent discrimination...in the sale, lease, or rental of real property because of...age,...pregnancy or parenthood", but it does not provide any remedies for these forms of discrimination. Alaska Statutes Section 16.80.200(b).

[48] In addition, some cities have enacted ordinances to ban child discrimination. See e.g. City of Austin, Texas Fair Housing Ordinance, Sections 7-4-16 through 7-4-40; City of New York (Local Law 17 of 1986 Council Int. No.9-A); City of Burlington, Vermont, Article IV of Chapter 18, §18-200; City of Los Angeles, California, Municipal Code, Article 5.5, §45.52; City of Seattle, Washington, Unfair Housing Practices Code, Administrative Code §14.08.

existence of a state law does not eradicate the problem of housing discrimination.

In general, the existing state laws are weak remedies for housing discrimination against families with children. Most of them have limited applicability, major loopholes and incomplete enforcement mechanisms. The weakness of these laws is exemplified by the fact that the federal Fair Housing Act would be stronger than virtually all of the existing state laws if "familial status" were added to it along with the increased administrative enforcement provisions of Senate Bill No. 558.

The most glaring deficiency in several of the state laws is that they exempt adults-only housing complexes or portions of complexes from the non-discrimination provisions.[49] These exemptions obviously create a significant loophole for the practice of discrimination and may, in fact, encourage discrimination. For example, the Virginia law prohibits housing discrimination on the basis of "parenthood," but then states that "it shall not be an unlawful discriminatory practice to operate an all-adult...housing community...or to maintain all-adult...sections of a housing community." Va. Code §36-88. Paradoxically, the Virginia law seemingly offers protection to

---

[49] This criticism of exemptions for adults-only units does not pertain to senior-citizen housing, which is a legitimate exception to a nondiscrimination provision. See Marina Point, Ltd. v. Wolfson, 30 Cal.3d 721, 742-743, 180 Cal.Rptr. 496, 640 P.2d 115 (1982) ("[A]ge qualifications as to a housing facility reserved for older citizens can operate as a reasonable and permissible means...of preserving specialized facilities for those particularly in need of such services or environment.")

families with children but then eviscerates this protection by permitting property owners to adopt no-children policies. The Rhode Island child discrimination law also sends a mixed message by exempting "any group of housing units designed exclusively for adults". R.I. Gen. Laws 34-37-3. The Arizona law exempts dwellings on property having a restrictive covenant against children or located in a subdivision "designed, advertised and used as an exclusive adult subdivision". Ariz. Rev. Stat. Ann. §33-1317 B.

A major loophole of the Minnesota law permits adults-only policies in one-third of a building's units, in one building of a two building complex, and in one-third of the buildings of a three or more building complex. Minn. Stat. Ann. §363.02, subd. 2 (2)(a). Massachusetts permits 50 percent of a building's units to be adults-only if the building has 100 or more apartments and has child tenants in the other units. Mass. Gen. Laws Ann. ch. 151B, §4 (11) (4). A landlord in Maine can exclude families with children from 25 percent of the units in an apartment complex. Me. Rev. Stat. Ann. title 5, §6027 (1). Moreover, some states allow property owners to exclude children if the development is restricted to adults who are middle aged. See New Hampshire Rev. Stat. Ann. §354-A:8 V-b (d) (45 years of age or older); Michigan Comp. Laws Ann. 37.2503 (1) (c) (50 years of age or older). The problem with the New Hampshire and Michigan laws is that they promote age-restrictive housing beyond that which is necessary to preserve senior-citizen housing.

Another weakness of state nondiscrimination provisions is their failure to cover all real estate transactions. Nine of the sixteen state laws are limited only to rental units and thus do not apply to discrimination in the sale of property.[50] Other states do not cover specific types of housing such as mobile home parks and condominiums.[51]

Many of the nondiscrimination provisions have limited coverage because they are not part of the state fair housing law that covers other protected classes from discrimination. For example, the New York child discrimination provision is found under Real Property Law, N.Y. Real Prop. §236, and not under sections of the Human Rights Law where other forms of housing discrimination are prohibited, N.Y. Exec. Law §296. As a consequence, the full panoply of administrative remedies is not available to victims of child discrimination; furthermore, landlords presumably are able to place discriminatory advertisements regarding children even though advertisements on the basis of race or sex are illegal under the Human Rights Law.

In some state statutory schemes, the child discrimination

---

50 Arizona, Connecticut, Delaware, Illinois, Maine, New Jersey, New York, Rhode Island, Vermont.

51 The California Mobilehome Residency Law seemingly permits adults-only mobile home parks, Cal. Civ. Code S^{c}Hs 798.76. This provision has been the source of much litigation. See e.g. Schmidt v. Superior Court, 170 Cal.App.3d 84, 215 Cal.Rptr. 840 (1985) review granted Sep. 25, 1985. The Minnesota statute is riddled with exceptions, including the exemption of one-third of the homes in a mobile home park, Minn. Stat. Ann. §363.02, subd. 2a (2), and of most condominiums, §363.02, subd. 2 (2)(b).

provisions are located in the civil rights law, but they are often not listed along with other protected classes in the main sections of the law. Instead, they are placed in separate sections where, because of poor drafting or intentional oversight, their applicability to specific discriminatory conduct is ambiguous. For example, the main provision of Massachusetts law dealing with fair housing lists three broad forms of proscribed activity, i.e. refusal to rent or sell, discrimination in the terms or conditions of the real estate transaction, and verbal inquiry concerning the characteristics of the person that are protected under law. The child discrimination section is separate from that provision and refers to only one proscribed activity, i.e. refusal to rent or sell. The question thus arises as to whether the legislature's failure to include the other types of discriminatory conduct means that the child discrimination section does not apply, for example, to discriminatory terms in a lease, e.g. higher rent or security deposit for tenants with children.

The laws of Illinois and New Jersey are not only limited to rental units but also do not cover all families with children. Both of these state laws prohibit housing discrimination against families with children but only if the children are under 14 years of age. Ill. Rev. Stat. ch. 68, §3-104; N.J. Stat. Ann. §2A:42-101. Families with older children are thus left unprotected from discrimination in the rental market.

The above discussion exemplifies the significant variations

in the substantive rights that the state statutes confer. Unfortunately, all of the laws have shortcomings that undermine their effectiveness. Of equal importance in measuring the laws' effectiveness are the procedural mechanisms by which these rights are enforced. At least three broad categories of enforcement are possible: a private right of action, administrative remedies, or criminal penalties.

Most of the laws give victims of discrimination a private right of action in the state courts.[52] A few states, however, permit only limited judicial remedies. For example, the New Jersey law authorizes an "injured party" to collect from an offending landlord a civil penalty of not more than $200.00 for the first offense and not more than $500.00 for each subsequent offense. N.J. Stat. Ann. §2A:42-102. The deficiency of the New Jersey law is that it does not expressly authorize other forms of relief such as actual damages and injunctive relief. Illinois requires a complainant to exhaust administrative remedies before judicial review. That review is then limited to determining whether the administrative "findings are contrary to the manifest weight of the evidence". Ill. Rev. Stat. ch. 68, §8-111 (A)(2). The Illinois law thus does not give the victim of discrimination the option of pursuing civil remedies in the first instance.

Many states provide for investigation and enforcement by an

---

[52] E.g., California, Connecticut, Michigan, Massachusetts, Maine, Minnesota, New York, Vermont, and Virginia.

administrative agency.[53] Administrative enforcement has the advantage of forcing property owners to sell or rent to families with children without the need for costly and time-consuming litigation. Typically, this type of enforcement involves the executive branch of government which receives, investigates, conciliates and, in some jurisdictions, formally resolves discrimination at no cost to the complainant. However, administrative enforcement is sometimes hampered by insufficient resources, inadequate remedies, and the reluctance of state officials to challenge powerful real estate interests. For example, California officials refused to provide administrative remedies for over two years after child discrimination was declared illegal. At first, they claimed that they did not have sufficient resources and then they argued that they did not have legal authority to handle the complaints.[54] After intense legal and political pressure, they started accepting complaints in December 1984 and within a year saw 30 percent of their caseload devoted to complaints of housing discrimination against families with children.[55]

The final means of enforcement is through criminal penalties. Although several states used to rely exclusively on

---

[53] E.g. California, Connecticut, Illinois, Maine, Massachusetts, Michigan, Minnesota, Montana, New Hampshire.

[54] See J. Morales, State Agency Finally Acts to Enforce Laws Protecting Families with Children from Housing Discrimination, 6 Youth Law News 1 (Jan.-Feb. 1985).

[55] Letter, Earl Sullaway, Deputy Director, Department of Fair Employment and Housing, to James Morales (Feb. 25, 1986).

criminal sanctions for discrimination,[56] Arizona is the only state that now relies solely on this weak enforcement mechanism. Az. Rev. Stat. Ann. §33-1317 A. A violation of the statute is a mere "petty offense". Criminal sanctions are the least effective way of preventing housing discrimination because they do not give the aggrieved party the power to control enforcement. Instead, they are dependent on the workload of the district attorney's office which is usually concerned with more serious crimes. Finally, the law usually imposes a small penalty for violations. Thirty-four states do not provide families with any legal means to challenge housing discrimination against children. The few states that do have enacted a hodgepodge of ineffective remedies that permit housing discrimination to flourish. In general, the states have refused to act against those landlords and sellers of real estate who essentially penalize parents for having children. When the states fail to protect such fundamental rights as family integrity, the federal government has an obligation to take action. In desperation, a few families have turned to the federal courts for protection from child discrimination under existing laws and, as the following section will demonstrate, have achieved limited success.

---

56 See e.g. J. O'Brien and F. Fitzgerald, Apartment for Rent-Children Not Allowed: The Illinois Children in Housing Statute-Its Viability and a Proposal for Its Comprehensive Amendment, 25 De Paul L.R. at 68-69 (1975). This article describes the deficiencies of the former Illinois child discrimination law which, among other things, permitted only criminal penalties for violations.

B. Federal Remedies For Housing Discrimination Against Families With Children Are Dependent On Difficult Evidentiary Burdens.

Although no federal law expressly prohibits adults-only housing, a family can attempt to obtain relief under the Fair Housing Act's provisions that prohibit discrimination on the basis of race or under constitutional protections of family integrity. These avenues of relief, however, require the skillful use of statistics to show that the age-restrictive housing policy has a racially-disparate impact or proof of state action--one of the prerequisites for constitutional litigation.

Challenges under existing provisions of Title VIII must rely on the doctrine of disparate impact. This doctrine states that a facially neutral policy, e.g. adults-only housing, that has a disproportionate and adverse effect on racial and ethnic minorities constitutes illegal discrimination. Only two published decisions from the federal courts have addressed housing discrimination against children under this analysis. Neither of these decisions held unequivocally that adults-only housing violated Title VIII.

In Betsey v. Turtle Creek Associates, 736 F.2d 983, 988 (4th Cir. 1984), the court found that a landlord's conversion of a building to adults-only "had a substantially greater adverse impact on minority tenants" because a greater number of minority than white households had children and were thus subject to

eviction due to the conversion.[57] The appellate court thus held that the tenants had established a prima facie case of racial discrimination under Title VIII but sent the case back to the trial court for a determination of whether the landlord could adequately justify the conversion to adults-only.

The Betsey decision is significant because the court adopted the theory that the racially discriminatory effect of adults-only policies, if not adequately justified, violates the Fair Housing Act. Nonetheless, the court did not rule on the merits of the race discrimination claim: it left for another day a ruling on whether the landlord's reasons for the adults-only housing would legally justify the discriminatory impact. Moreover, the facts of Betsey were most compelling given that the adults-only policy resulted in the eviction of almost 75 percent of the minority tenants but only about 25 percent of the white tenants. The court's failure to rule on the merits, the extreme set of facts, and its reliance on complex theories of racial discrimination make the Betsey decision an uncertain precedent for other victims of child discrimination to use.

The Betsey case is consistent with an earlier case, Halet v. Wend Investment Co., 672 F.2d 1305, 1311 (9th Cir. 1982). In that case, plaintiffs challenged an adults-only housing policy

---

[57] At trial, plaintiffs proved that the conversion of the building to adults-only resulted in eviction notices being sent to 54 percent of the non-white households in the building, but only 14 percent of the white households. Of the total number of tenants in the building, 74.9 percent of the nonwhites were to be evicted in comparison to only 26.4 percent of the whites. 736 F.2d at 988.

and alleged that in Los Angeles only 38 percent of white households have children, but that 62 percent of Black households and 69 percent of Hispanic households have children. In ruling on a motion to dismiss, the court held that plaintiffs stated a cause of action of discriminatory effect under the federal Fair Housing Act. The Halet court's ruling on the Title VIII claim is even more limited than the Betsey decision because it merely addressed whether the litigants had stated a cause of action and not whether they had established a prima facie case or actually proven racial discrimination.

The Halet case is also significant for another reason. It established that, in a limited number of situations, an adults-only policy can be challenged under the United States Constitution. There, the court ruled that the "choice of parents to live with their children" touches on the fundamental right of family privacy. 672 F.2d at 1311. Although not explicitly addressing the source of this right, the court implied that an adults-only policy might constitute an irrational classification in violation of the equal protection clause or infringe a liberty interest protected by the due process clause. The court's ruling, similar to its ruling on the Title VIII claim, is extremely limited because it merely holds that the litigant has a cause of action. Furthermore, constitutional protection from no-children policies would be available only where the victim could prove that the property owner's discriminatory policy constituted state action. This prerequisite for constitutional litigation

means that few families will be able to rely on Halet to obtain relief from age-restrictive housing policies.

As families with children seek relief from housing discrimination, they have turned to the federal courts and relied on novel legal theories. The sparse body of federal law that has developed has generally recognized the interests of families in equal access to housing. Nonetheless, the narrow decisions from the two federal courts of appeal leave many unanswered questions; moreover, they certainly do not establish remedies for families outside of those judicial circuits.

IV. CONCLUSION

Almost forty years ago, Congress set the national goal of a decent home and suitable living environment for every American family.[58] Unfortunately, we have not yet achieved that goal. On numerous other occasions, Congress has enacted legislation that was designed to strengthen the family. Moreover, the United States Supreme Court has consistently recognized the importance of the family and described the family unit as "perhaps the most fundamental social institution of our society."[59] In spite of these various pronouncements by the federal government, we witness one of the most anti-family trends to gain significant popularity: denial of housing to families because parents decided to have children. What society can last where the

---

[58] 42 U.S.C. §1441.

[59] Trimble v. Gordon, 430 U.S. 763 (1977).

government condones significant hardship for those who decide to raise children? As one court has eloquently stated:

> A society that sanctions wholesale discrimination against its children in obtaining housing engages in suspect activity. Even the most primitive society fosters the protection of its young; such a society would hardly discriminate against children in their need for shelter.[60]

Congress now has the opportunity to promote pro-family policies and to act effectively where most states have failed. Inclusion of "familial status" as a protected class in the Fair Housing Act would alleviate the burden of many families in finding a decent home. It would also give real meaning to the frequently-expressed support of the family.

---

60 Marina Point Ltd. v. Wolfson, 30 Cal.3d 721, 180 Cal.Rptr. 496, 640 P.2d 115 (1982).

JAMES B. MORALES

HOME ADDRESS
1410 Rhode Island Street
San Francisco, CA 94107
(415) 648-5019

BUSINESS ADDRESS
1663 Mission Street, 5th Fl.
San Francisco, CA 94103
(415) 543-3307

EDUCATION

UNIVERSITY OF MICHIGAN LAW SCHOOL, Ann Arbor, Michigan. J.D., May 1979.

UNIVERSITY OF CALIFORNIA, Berkeley, CA. A.B., June 1976.

BAR ADMISSION

STATE OF CALIFORNIA, November 1979.

CURRENT EMPLOYMENT

NATIONAL CENTER FOR YOUTH LAW, 1663 Mission St. 5th Flr. San Francisco, CA, August 1979-present. Staff Attorney: I engage in civil litigation, train lawyers and other professionals, and write articles on the rights of poor families and children. I specialize in fair housing law for families with children, juvenile corrections, and youth employment.

SIGNIFICANT LITIGATION AND ADVOCACY

YOLANO-DONNELLY TENANT ASSOCIATION V. PIERCE, No. S-86-0846, (E.D. Cal. filed July 15, 1986). Co-counsel. Nation-wide class obtained preliminary injunction against HUD regulations denying housing to citizens who reside with undocumented family members.

SCHMIDT v. SUPERIOR COURT, No. LA 32110, (review granted Sep.25,1985 by Cal. Supreme Court). Amicus Curiae. Family with children challenges adults-only policy in mobilehome parks under state civil rights law and constitution.

MONTES V. FAIR EMPLOYMENT AND HOUSING COMMISSION, (administrative petition, filed Nov. 15, 1984). Co-counsel. Complaint led to state agency's enforcement of law protecting families with children from housing discrimination.

MORALES v. TURMAN, 383 F.Supp. 53 (E.D. Tex. 1974), settled April 16, 1984. Co-counsel. Settlement imposed major reforms on Texas' juvenile corrections.

BETSEY v. TURTLE CREEK ASSOCIATES, 736 F.2d 983 (4th Cir. 1984). Amicus Curiae. Court issued the first federal appellate decision holding that adults-only housing constitutes race discrimination.

JOHNSON v. SMITH, 487 F.Supp. 977 (E.D. Mich. 1980), aff'd in part and rev'd in part sub nom, Martin v. Attorney General, 771 F.2d 102 (6th Cir. 1985). Co-counsel. Court held that youth offenders in federal prisons must receive specialized services and be segregated from adults.

EXHIBIT 1

PUBLICATIONS

AN OVERVIEW OF HOUSING DISCRIMINATION AGAINST FAMILIES WITH CHILDREN, in H. Davidson & R. Horowitz, Legal Advocacy for Children and Youth: Reforms, Trends, and Contemporary Issues, (American Bar Association, National Legal Resource Center for Child Welfare Programs, 1986) (with A. Bussiere).

FEDERAL PROTECTIONS FOR FAMILIES WITH CHILDREN: EMERGING REMEDIES OR FALSE PROMISES, 25 Trends in Housing, No. 2, at 4 (Aug/Sep 1986).

OCCUPANCY STANDARDS VIOLATE FAMILY'S RIGHT TO PRIVACY, 7 Youth Law News 7 (July-Aug 1986).

RESTRICTIVE OCCUPANCY STANDARDS HELD DISCRIMINATORY, 7 Youth Law News 8 (May-June 1986) reprinted in 20 Clearinghouse Review 153 (June 1986).

RESTRICTIVE OCCUPANCY STANDARDS. LANDLORDS FIND NEW WAYS TO DISCRIMINATE AGAINST CHILDREN, 7 Youth Law News 1 (March-April 1986), summary reprinted 20 Clearinghouse Rev. 152 (June 1986).

MICHIGAN SUPREME COURT SKIRTS RULING ON CHILD BIAS IN HOUSING, 6 Youth Law News 1 (May-June 1985).

STATE AGENCY FINALLY ACTS TO ENFORCE LAWS PROTECTING FAMILIES WITH CHILDREN FROM HOUSING DISCRIMINATION, 6 Youth Law News 1 (January-February 1985).

CALIFORNIA MOVES TO CLARIFY COURT DECISIONS BANNING ADULTS-ONLY HOUSING, 5 Youth Law News 3 (November-December 1984).

RECENT FAIR HOUSING ACT LITIGATION: BETSEY V. TURTLE CREEK ASSOCIATES, 18 Clearinghouse Rev. 640 (November 1984).

USE OF THE FAIR HOUSING ACT TO REDRESS HOUSING DISCRIMINATION AGAINST FAMILIES WITH CHILDREN, 17 Clearinghouse Rev. 736 (November 1983).

MOBILEHOME PARKS IN CALIFORNIA: LAST STAND FOR AGE-RESTRICTIVE HOUSING POLICIES?, 4 Youth Law News 1 (November-December 1983).

EMERGING RESPONSE TO HOUSING DISCRIMINATION AGAINST FAMILIES WITH CHILDREN, 4 Youth Law News 1 (September-October 1983).

A NOTE ON THE APPOINTMENT OF A SPECIAL MASTER, 16 Clearinghouse Rev. 235 (July 1982).

GOVERNMENTAL RESTRAINTS ON THE EMPLOYMENT OF SIXTEEN- AND SEVENTEEN-YEAR-OLDS: VESTIGES OF A BYGONE ERA, 13 Clearinghouse Rev. 941 (April 1980) (with J. Greene).

RECENT TRAINING

FAMILIES' RIGHTS TO HOUSING UNDER FOSTER CARE LAW, workshop at conference of National Legal Aid and Defenders Association (NLADA), Wash. D.C., Oct. 23, 1986.

RECENT TRAINING, continued,

STATE-WIDE TRAINING ON STATE LAW REMEDIES FOR HOUSING DISCRIMINATION, seminars in Los Angeles and San Francisco, June 7 and 14, 1986.

NEW APPROACHES TO FAMILY DISCRIMINATION, workshop at North-South Fair Housing Coalition, Los Angeles, CA, May 5, 1986.

LEGAL ISSUES AFFECTING POOR CHILDREN, California state bar seminars in Los Angeles and San Francisco, April 19 and May 10, 1986.

FAIR HOUSING LAW FOR LOW INCOME FAMILIES, workshop at conference of National Legal Aid and Defenders Association, Washington, D.C., December 3, 1985.

STATE OF THE ART FAIR HOUSING ISSUES, workshop at the national conference sponsored by the Ohio Fair Housing Congress, Toledo, Ohio, October 29, 1985.

HOUSING DISCRIMINATION AGAINST FAMILES WITH CHILDREN, workshop at NLADA youth law training, Portland, Oregon, July 25, 1985.

NEW ARENAS OF HOUSING DISCRIMINATION, speech at conference of HUD's Fair Housing Assistance Program, Atlantic City, New Jersey, May 30, 1985.

ZONING LAW AND GROUP HOMES, training at annual conference of the National Network of Runaway and Youth Services, Washington, D.C., February 4, 1985.

HOUSING DISCRIMINATION AGAINST FAMILIES WITH CHILDREN: EMERGING RIGHTS AND REMEDIES, workshop at NLADA conference Denver, Colorado, December 5, 1984.

FAIR HOUSING LAW FOR FAMILIES WITH CHILDREN, speech at conference of the Greater Des Moines Community Resource Board, Des Moines, Iowa, October 19, 1984.

EMERGING LEGISLATIVE AND JUDICIAL RESPONSE TO AGE-RESTRICTIVE HOUSING, workshop at the Wisconsin Equal Rights Division conference, Racine, WI, May 5, 1984.

GOVERNMENT AND PUBLIC SERVICE

BAR ASSOCIATION OF SAN FRANCISCO, Subcommittee on Minority Rights, Chair, June 1986-present, Nominating Committee 1986.

JAIL POLICY AND PLANNING ADVISORY COMMITTEE to S. F. Bd. of Supervisors, 1987.

CITIZENS COMMITTEE ON COMMUNITY DEVELOPMENT, Member, April 1985-March 1987.

AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, Vice Chair, Board of Directors; Executive, Legislative and Legal Committees, Sep. 1983-present.

YOUTH ADVOCATES, INC., President, Board of Directors, Aug. 1981-June 1983.

YOUTH NEWS, INC., Board of Directors, April 1985-May 1986.

EMPLOYMENT AND TRAINING COUNCIL of San Francisco, Member, Feb. 1980-Oct.1983.

Senator SIMON. Thank you, Mr. Morales.
Ms. Pearce.

STATEMENT OF DIANA M. PEARCE

Ms. PEARCE. Exclusion of families with children from housing is at the center of the growing crisis of shelter for families, a crisis which circumscribes the lives and hopes of all families and threatens the continued existence as a family of some.

I want to talk about four things today: First, that discrimination against families with children is a widespread and growing phenomenon; second, that it is correlated with race and sex discrimination to a high degree; third, that it is occurring in a housing market context of decreasing availability and increasing costs of all kinds of family housing; and, finally, that it has negative consequences for children and their parents, including hunger, homelessness, hopelessness and family breakup.

Since the first two witnesses have discussed the extent of housing discrimination against families with children, I am not going to say much about that except to emphasize that there are twice as many units that exclude children, there are twice as many units that restrict children by the age of the children, by the number of children in the family. In this area, it is very common to restrict to four the number of people that can live in a three-bedroom apartment, even though it is quite large.

The second point I wanted to talk about was discrimination against families with children is highly correlated with race and sex discrimination. Minority households are more likely to have children in them, they are also more likely to be larger, and they are also more likely to be renters and to be lower income.

The overwhelming majority of single parent families are headed by women, and those families now account for one-fifth of all families with children. They average 43 percent of the income of married couple households and have to live below the poverty level. Not surprisingly, women who maintain households are two-thirds renters.

What all these figures mean is that the housing agent who wishes to discriminate on the basis of race or sex can now do so effectively and legally in most jurisdictions by discriminating against families with children. Because the impact is so disproportionate by race and sex, discrimination against families with children clearly contributes to racial segregation in schools, as well as in housing, and in some cities, particularly in the Southwest and the West, people are starting to refer to children's ghettos, and isolates and ghettoizes mother-only families, particularly minority mother-maintained families.

Third, discrimination against families with children occurs in a housing market context of decreasing availability and increasing costs. For sale housing has become increasingly expensive, with prices out of range for more and more families. Between 1970 and 1980, average incomes doubled, but average house prices tripled. Priced out of house ownership, families with children enter a rental housing market which is experiencing a classic supply and demand squeeze, the supply is decreasing and the demand is in-

creasing, and the result is that prices are rapidly rising. There are four sources that I will just mention—I can go into more detail if you want—of the squeeze in the rental housing market.

One is that condominiums and gentrification are taking rental units out of rental status and making them owner occupied; second is that new units are being down-sized, being built for singles and retired couples; third, there is a destruction in non-replacement of rental housing which is particularly a problem for low and moderate income families because public housing authorities do not have the resources to rehabilitate or even maintain housing.

There are now 100,000 publicly owned housing units which are standing empty and unused in need of repair. In Dallas, for example, of 7,000 public housing units, 1,200 stand unused and boarded up for the lack of funds.

In addition, the federally encouraged practice of foreclosing, selling, and/or prepaying the mortgage on public or subsidized housing, at which point you no longer have to have it as public housing, is decreasing the public housing stock. Until 1983, public housing authorities were required to replace each unit sold or demolished, but no longer.

Finally, housing subsidies have been cut more than any other program, almost 70 percent between 1981 and 1986. The need, in contrast, is expanding. Only one-fourth of eligible families are helped in any way by our housing programs. The average time on the waiting list for public housing is 18 months across all cities, but is 3 years in Philadelphia, 5 years in Boston, and 10 years in Chicago. Even these figures are underestimates for many jurisdictions, such as Rockville, MD, are refusing to accept any more names. Two-thirds of the cities surveyed by the U.S. Conference of Mayors have simply closed their waiting lists for public housing.

In sum, families with children are finding themselves in a constricted housing market that is shrinking and finding that among the shrinking units the housing discrimination against families with children is making it more and more difficult for them to find housing.

As a result, many families are finding themselves totally without housing. Families who experience discrimination feel dehumanized, insulted and ostracized. As one parent put it, "having a child is like having leprosy." Children feel guilty for having caused their parents so much trouble and grief.

The 1980 survey found that one-fifth of the families had to split up temporarily and for half of those families they were split up for 4 months as they searched for housing.

The National Coalition for the Homeless reports that, "In New Jersey, homelessness is the primary cause of family separation." New York estimated last year that 236,000 families were doubled up, as they searched for housing.

The combination of the shortage of affordable housing and housing discrimination has created a rapidly escalating problem of homelessness among families with children. Three major separate studies issued in recent months have all come up with the same conclusion: Families with children are the fastest growing segment among the homeless. Even their estimates of the increase were almost identical. In the last 12 months, approximately 25 percent

more families with children have become homeless, and all of the cities say that this is going to increase.

The shelter and service systems, of course, are ill-equipped to deal with this. I do not think that this is the kind of society we want for ourselves or for our children. I do not think we want a society in which a substantial number of children and their families are urban nomads, wandering from crowded to inadequate housing, hiding from landlords and housing authorities, never knowing if they will be in the same school or neighborhood from one week to the next.

The costs of doing nothing in this case are great, in human as well as economic terms. The costs of doing something, of declaring it illegal to discriminate against families with children, are zero in economic terms, but priceless in human terms.

I urge you today to take such action for the sake of our children and for the sake of our future as a country.

Thank you.

[The prepared statement of Ms. Pearce follows:]

Statement

by

Diana M. Pearce
Director,
Women and Poverty Project

"NO ROOM AT THE INN..."

'No room at the inn...' is being heard with increasing frequency by children and their parents in America today, especially if theirs is a minority family, a large family, and/or a family maintained by the mother alone. Exclusion of families with children from housing is at the center of the growing crisis of shelter for families, a crisis which circumscribes the lives and hopes of all families and threatens the continued existence as a family of some.

My discussion today will be organized around four points. These are:

1. DISCRIMINATION AGAINST FAMILIES WITH CHILDREN is a widespread and growing phenomenon.

2. DISCRIMINATION AGAINST FAMILIES WITH CHILDREN is highly correlated with race and sex discrimination, and is being substituted for race and sex discrimination.

3. DISCRIMINATION AGAINST FAMILIES WITH CHILDREN occurs in a housing market context of decreasing availability, and increasing costs, of all kinds of family housing.

4. DISCRIMINATION AGAINST FAMILIES WITH CHILDREN has serious negative consequences for children and their parents, including increased hunger, impoverishment, homelessness, hopelessness, and family break-up.

1. DISCRIMINATION AGAINST FAMILIES WITH CHILDREN is a widespread and growing phenomenon.

According to a 1980 HUD study, one-fourth of rental units nationwide exclude families with children altogether, and another fifty percent restrict families with children. These restrictions include limits on the size of the household that may occupy a unit which are considerably more stringent than those set by law, for example, a common restriction in this area is one that limits the number of persons in a three-bedroom apartment to four. A second type of restriction imposed limits the children by age; sometimes it is babies, and other times it is teenagers who are not allowed. A third type of restriction forbids children of the opposite sex from sharing a bedroom, and is sometimes backed up with references to HUD or state regulations (which do not exist, but are cited anyway.) Finally, families with children may be restricted by the imposition of higher security deposits or other financial costs.

78-076 O - 88 - 8

All the evidence points to these practices increasing. New apartment complexes have higher rates of exclusion, and in some areas, entire communities are being built and marketed as exclusively 'adult' communities. In Los Angeles, three-fourths of new units exclude children, and a Denver survey estimated that 90% of new units excluded children. Although not at the same rate, older units that originally did not excluded children, have increasingly adopted either exclusionary or restrictive rules. Even smaller cities are showing this pattern; for example, a 1983 survey of Norman, Oklahoma, found that 59% of rental units excluded children, and another 16% restricted occupancy by families with children.

2. DISCRIMINATION AGAINST FAMILIES WITH CHILDREN is highly correlated with race and sex discrimination, and is being substituted for them.

Minority households are more likely to have children in them: 59% of black, 68% of Hispanic, but less than half of white households have children living in them. Minority households are also likely to be larger: while 16% of Hispanic, and 13% of black households have six or more persons in them, only 6% of white households are that large. Thirty-nine percent of black, and 30% of Indian children live in extended family households. Because of lower income and larger size, minority families with children are more likely to be renters; 59% of minority, compared to 29% of white families with children are renters.

The overwhelming majority of single parent families are headed by women, and such families now account for more than one-fith of all families with children. With incomes that average 43% of the average income of married couple households, it is not surprising that almost half have incomes below the poverty level, and two-thirds rent their housing (compared to one-fourth of all American families.) In addition, minority households are more likely to be maintained by women; 48% of black, 24% of Hispanic, and 14% of white families with children are headed by mothers alone.

What all these figures mean is that the housing agent who wishes to discriminate on the basis of race or sex, can now do so, effectively and legally in most jurisdictions, by discriminating against families with children. Because the impact is so disproportionate, discrimination against families with children clearly contributes to racial segregation in schools as well as housing, and isolates and ghettoizes mother-only families.

3. DISCRIMINATION AGAINST FAMILIES WITH CHILDREN occurs in a housing market context of decreasing availability, and increasing costs of all kinds of family housing.

First, FOR SALE housing has become increasingly expensive, with prices out of range for more and more families. Between 1970 and 1980, average incomes doubled, but average house prices tripled. Only 5% of American families can now afford a new home. For the low-income family, the change is even more striking: a decade ago, such a family (with income just above the poverty line), at then-current prices and interest rates, could afford one-eighth of resale homes on the market. Today, a family with the same economic resources (relatively speaking), can only afford 3% of the resale housing available.

Priced out of house ownership, families with children enter a rental housing market which is experiencing a classic supply and demand squeeze: the supply is decreasing, the demand is increasing, and the result is that prices are rapidly rising. There are four sources of the decrease in rental housing available for families:

1. Condominiums and gentrification: housing is being shifted from rental to owner-occupied status through dondominimization and gentrification, resulting in a net loss of units, particularly those that rented at moderate levels. For example, suburban Montgomery County, Maryland, has seen 7000 housing units become condominiums in the last decade.
2. Down-sizing of units: production in the rental housing market has shifted in recent years away from family-size units, and towards smaller units for the single person, the retired couple, etc.
3. Destruction and Non-replacement of Rental Housing: Housing is being destroyed and not replaced. This is particularly a problem for low and moderate income families: by the early 1980s, most multi-family housing was partially aided by federal monies or guarantees, which have all but disappeared by the mid-eighties.

Likewise, public housing authorities do not have the resources, and they are not coming from the federal government, to rehabilitate, or even simply maintain and pay operating costs, (much less build new) public housing. As a result, 100,000 publicly-owned housing units stand empty and unused, in need of repair. In Dallas, for example, of 7000 public housing units, 1200 stand unused and boarded up, for lack of necessary funds. In addition, the federally encouraged practice of foreclosing, selling, and/or prepaying the mortgage on public or subsidized housing is decreasing the public housing stock. Until 1983, public housing authorities were required

to replace each unit sold or demolished, but no longer. As the local papers have reported, many tenants of such housing find themselves out on the street.

4. Housing subsidies' cut: Federal housing subsidies, for production, rehabilitation, and rental subsidy, have been cut more than any other program, dropping from $32 billion in 1981 to less than $9.6 billion in 1986, a decrease of almost 70

The need, in contrast, is expanding. Only one-fourth of needy, eligible, families receive any kind of housing aid. The Urban Institute estimates that the number of families receiving public help in meeting their housing needs decreased by 300,000 since 1981. The average time on the waiting list for public housing is eighteen months across all cities, but is three years in Phildelphia, five years in Boston, and ten years in Chicago. Even these figures are underestimates, as many jurisdictions, such as Rockville, Maryland, are refusing to accept any more names: two-thirds of the cities surveyed by the U.S. Conference of Mayors have simply closed their waiting lists for public housing.

In sum, families with children, especially those which are low-income, are maintained by women alone, and/or are minority, find themselves forced out of the sales market by high prices, and into a rental market shrunk by condominimization, destruction of units, non-production, particularly of moderate-rent units by either the private or public housing builders, and severe cuts in rent subsidies. When this shrunk rental housing market is further restricted by discrimination, it should not be surprising that 'affordable family housing' becomes an increasingly endangered species.

4. DISCRIMINATION AGAINST FAMILIES WITH CHILDREN has serious negative consequences: hopelessness, homelessness, and family break-up

Families who experience discrimination in their search for housing pay an emotional price. They feel dehumanized, insulted and ostracized: as one parent put it, "Having a child is like having leprosy." Children feel guilty for having caused their parents so much trouble and grief. Parents out of desperation find themselves lying, or trying to hide their children.

The 1980 HUD survey found that for one-fifth of the families surveyed their lack of initial success in finding housing forced them to split up the family temporarily; for half of these families, the living apart lasted for at least four months.

The National Coalition for the Homeless reports that "In New Jersey, homelessness is the primary cause of family separation. The state uses homelessness as the basis for forcibly separating children from their parents and placing them in foster care..[a primary cause of homelessness] is the refusal of many landlords to accept children as tenants." In Kansas City, according to the Mayors' Conference, "families have been forced to stay with relatives, sleep in cars, abandoned fuildings, or in some cases, split themselves into smaller units..." Others move in with other households; New York City estimated last year that 236,000 families were doubled up. Obviously, splitting up or doubling up are at best a temporary solution, for the overcrowding that results quickly exhausts the goodwill and resources of the relatives or friends imposed upon.

The combination of the shortage of affordable housing and housing discrimination has created a rapidly escalating problem of homelessness among families with children. Three major studies issued in recent months have all come up with the same conclusion: families with children are the fastest growing segment among the homeless. Even their estimates of the increase were almost identical: approximately 25% over the last year, with no sign of it levelling off. More than a third of the homeless are now families with children. New York City now has more homeless children than single people who are homeless. Milwaukee reported to the National Coalition that"homelessness among families is on the rise - 'we're talking babies on the street."

The shelter and service systems for the homeless are ill-equipped to deal with families. For example, the Seattle Emergency Housing Coalition housed 304 families last year - and turned away 4700 homeless families. Likewise, Phoenix has a total of 26 beds for homeless families. Moreover, the few shelter spaces available to familes with children are limited to a few days or weeks' residence.

Thus the shortage of housing, which is exacerbated by discrimination against families with children, is for some families, the proverbial straw that broke the camel's back. For families who are already economically marginal, who have experienced unemployment, rising rents, and cutbacks in social programs, homelessness is the last step before family break-up, as the children are put in foster care, and the parents are left to fend for themselves, on the streets or in shelters for the (adult) homeless.

CONCLUSION

I do not think that this is the kind of society we want, for ourselves, or for our children. I do not think we want a society in which a substantial number of children and their families are urban nomads, wandering from crowded to inadequate housing, hiding from landlords and housing authorities, never knowing if they will be in the same school or neighborhood from one week to the next. The costs of doing nothing, in this case, are great, in human as well as economic terms. The costs of doing something, of declaring it illegal to discriminate against families with children, are zero in economic terms, but priceless in human terms. I urge you today to take such action, for the sake of our children, and for the sake of our future as a country.

Senator SIMON. I thank all three of you.

One general question: I heard a lot of statistics. Unfortunately, most people, including some of us who are in the U.S. Senate, do not understand statistics. You know, we just get overwhelmed with them. Can any one of the three of you give me a case of an actual family, what has happened to the Jones family or the Smith family or anyone else?

Ms. PEARCE. We helped an Afghan refugee family when they first came to this country. They lived with us and then they sought housing. This is in Montgomery County. They had two boys, two girls and two parents. They could not find a three-bedroom apartment that would accept them. We ended up sometimes saying that two of the children would remain with us. They moved five or six times in about 2 years. They finally gave up and moved to Virginia, in a much more crowded situation, much more expensive, and it was simply because there were restrictions on families with children. Montgomery County actually has an ordinance, but it does permit restrictions, so that the restrictions limit families.

Here was a family that could support itself, it was not an income issue, it was simply that landlords did not want children and they were free to discriminate.

Senator SIMON. Ms. Pearce, that was a family that could support itself and had the option of moving to Virginia. What happens to a family in Maryland, a really poor family with those children?

Ms. PEARCE. They seek shelter. One of the things that happens, for example, in the District of Columbia, if you seek shelter and you are a family with children, and many homeless families with children are headed by single parents, but even if it is a two parent family and there are not spaces—and that is very true in most cities, that they have very few spaces for families with children, and it is in the evening or on the weekend, adults are referred to adult shelters and the children are put in foster care and the family is split up.

Of course, once the family is split up, it becomes extremely difficult to get back together.

Mr. ABRAMS. Senator Simon, the examples are legion. We have families, 35 percent of the families who are homeless constitute families with children, and so you have in New York City, in any event, intolerable circumstances where these families are living in large shelters that are warehouses, without proper accommodations for children, and if there are no viable alternatives or continued discrimination against families with children, these families are going to have to live in these inhumane circumstances and conditions, rather than having their own apartment and their own household.

We have complaints of working mothers who are desperately trying to provide income for the family and give the love and attention in the home setting for the family, and because this particular mother was denied the opportunity to get the apartment that was closer to work, she had to spend more time, a half hour more on the road in the morning and in the evening to travel to work and was delayed in getting back to the apartment so the child did not have that kind of parental care for an hour a day merely because

there was discrimination against that individual on the basis of children being in the family.

One could go and cite circumstance after circumstance and the devastating impact that it has on family life, and I think our goal is to try to break down these barriers, and I think it is admirable that you and your colleagues are seeking to make this national policy and have this as the uniform approach across the land.

Senator SIMON. Let me play the devil's advocate for a minute. We hear from those who oppose this bill that we ought to leave this up to State and local governments, the Federal Government should not get involved.

You are a state official, you are here testifying on behalf of Federal legislation. Why should we not leave this to State and local governments?

Mr. ABRAMS. In the sixties, the Congress, to its great credit in my view, passed landmark civil rights and human rights legislation giving people the right to vote in the Voting Rights Act, giving people basic rights under the Housing Act of 1964, the Fair Housing Act of 1968. It seems to me with this legislation we are amplifying the rights for individuals, why should individuals who are handicapped or those who happen to be children not get the full benefit of the Federal commitment and the Federal law. And the very underpinning of this Nation is the notion of equality, and the Federal Government stands for that and I think Mr. Morales indicated that there are enormous gaps throughout this country, States that have no enactments at all with respect to this, in many instances where there is legislation that is inadequate, it is riddled with loopholes.

So as a State law enforcer, I welcome the opportunity for the Federal authorities to pass this legislation.

Mr. MORALES. If I may comment, Senator Simon?

Senator SIMON. Yes.

Mr. MORALES. I think if you take a look at history, you will also find that before Congress passed the Federal Fair Housing Act, that a number of States had enacted housing discrimination provisions in their State law but it was not enough, and Congress made a decision that those State remedies were not sufficient because it had a commitment to ending racial discrimination in housing.

I think that is the position we are in today. As I mentioned before, only 16 States have a law that prohibits discrimination and in many of those States the remedies are nonexistent for certain families, depending upon the types of housing they are going after or depending upon their characteristics. So they really do not have effective remedies and the State and local governments, I am afraid, are sometimes pressured too much by real estate interests at a local level so that they do not in fact pass legislation that is meaningful for protecting families with children.

Senator SIMON. Mr. Morales, again, let me play the devil's advocate here, although obviously as a cosponsor I favor the legislation. Some people would argue why shouldn't someone who owns a home have the right to say, I dó not want a family with five children in my home, I want to protect that property. How would you respond to that?

Mr. MORALES. Well, first of all, landlords have many ways of protecting their property. There have been longstanding rights and duties that landlords have the authority to promulgate reasonable rules regarding tenant conduct, they have the authority to evict, they have authority in most jurisdictions to set rents that they believe are appropriate. So landlords in essence have a longstanding tradition of authority to control disruptive behavior, to control tenants who cause problems or cause excess damage.

I think when you take a look at the crisis that families face today and the problem of the rental market and how tight it is in certain jurisdictions, that the balance tips in favor of the families with children and not in favor of the landlord who does not want a particular class of individuals living in a unit.

Senator SIMON. Attorney General Abrams, Secretary Pierce testified for the administration, that rather than an administrative law judge, we should leave this up to arbitrators. Any response, any immediate reaction?

Mr. ABRAMS. Well, we like the formulation that was contained in the bill. It was a good combination of local ability for enforcement, and if there was failure on the part of the local entities to enforce, then HUD would be able to step in, and we like the strength of the remedies that were available on the Federal and the local level, to be able to impose damages, to be able to mandate the ordering of availability of housing, all of that appealed to us by way of putting teeth behind any kind of general language of prohibition against discriminatory conduct or behavior.

Senator SIMON. We thank you very, very much for your testimony and your leadership in this area.

I might add that Senator Kennedy had planned to be here to hear your testimony as well as that of the other witnesses, but a bill he is sponsoring was unexpectedly called to the floor and he asked that I extend his regrets.

The next panel, Mr. Jordan Band, of the Community Relations Board of Cleveland; Mr. Homer Floyd, executive director of the Pennsylvania Human Rights Commission, and Mary Rose Wilcox, a member of the City Council of Phoenix.

I am going to call on my colleague, Senator Metzenbaum, who has been a leader on this issue and a host of other issues, to introduce our first witness here.

Senator METZENBAUM. Thank you, Mr. Chairman.

I am very happy that Jordan Band is here today, because I do not think there is anybody who is more knowledgeable about this subject than he. He just celebrated 10 years of service to the Community Relations Board, chairman of the Community Relations Board of Cleveland.

He is formerly the national chairman of the National Jewish Community Relations Advisory Council. He has held a host of positions in any one of a number of organizations and I know that his concern about this issue is very sincere, very dedicated, he is very knowledgeable, and so I am very happy to join you in welcoming him here to our hearing this afternoon.

It is nice to have you, Jordan.

Senator SIMON. Mr. Band.

A PANEL CONSISTING OF JORDAN C. BAND, VICE CHAIRMAN, COMMUNITY RELATIONS BOARD, CLEVELAND, OH; HENRY HAIN, DIRECTOR, HOUSING DIVISION, PENNSYLVANIA HUMAN RELATIONS COMMISSION; AND MARY ROSE WILCOX, MEMBER, CITY COUNCIL, PHOENIX, AZ

Mr. BAND. Thank you, Senator Metzenbaum, Senator Simon.

I am the presiding officer of the Community Relations Board of the city of Cleveland, OH, which is the local public agency authorized by ordinance to safeguard civil rights and promote an improvement of human relations in Cleveland.

For almost 30 years, I have been engaged as a volunteer in efforts to improve community relations in Cleveland and elsewhere in the United States, and these included efforts to achieve fair housing legislation in Ohio long before the enactment of the Civil Rights Act of 1968.

I appear today in support of the Fair Housing Amendments Act of 1987, as proposed, primarily for three reasons. It is my feeling that we as a nation have not succeeded in eradicating housing discrimination in this country or even in impressing on large numbers of people that the fair housing laws exist and will be effectively enforced. We need to send a strong new message that the time has come when discrimination in housing will no longer be tolerated.

Second, it is my belief that housing discrimination is the key to many other forms of prejudice, even violence against minorities. If we cannot solve this problem, civil rights enforcement and awareness will continue to erode across the board.

Last, I am here because I believe that the experiences which I can report from Cleveland will be helpful to you in considering this legislation.

Cleveland was one of the first cities in America to establish a community relations board following World War II. It is a city where for 40 years we have been attempting to deal with problems of housing discrimination, I must say quite sadly with very mixed results.

Despite the existence of the Federal fair housing law, despite the existence of a State fair housing law adopted in Ohio many years earlier, housing discrimination persists. I have no way of estimating the number of local incidents of housing discrimination based on race, but all too many of them not only result in discrimination but also in vandalism and in intimidation and even in physical violence.

In the city of Cleveland in 1986, there were 77 violent incidents in which our staff at the community relations board found substantial evidence of racial motivation as the primary and significant factor. Most of them involved neighborhood confrontations following attempts by minorities to move into mostly white neighborhoods. They involved arson, attempted arson, firing of weapons, cross burnings, paint spray damage, threatening letters, threatening graffiti, broken windows and all of the other traditional methods of threats and menacing.

And the problem seems to be growing. This last year's 77 incidents compare with 50 reported in 1985 and 24 in 1984. One such incident which attracted national attention last year involved a

gang of unruly neighbors who terrorized a black family which had recently moved into the neighborhood. It was a very dramatic incident which involved national media attention, and I can discuss it further if the Senators wish.

But most tragic of all was an incident which occurred in June 1985 when a Cleveland black family, husband, wife, and children, were burned out of their home simply because they exercised their right to live in a neighborhood of their choice, and in that fire the husband's mother, Mabel Gant, was burned to death. The perpetrator of that terrible act has never been brought to justice.

Until people understand that even without violence, housing discrimination is a crime and that the perpetrators are must be punished. We will continue to face these outrageous acts.

Cleveland is about to adopt a local fair housing ordinance. In the past, we felt we did not need one, mainly be cause of the existence of State and Federal fair housing laws. But it is now apparent to me that every branch of government, Federal, State, and local, must once again make strong statements, strong expressions of public policy that housing discrimination will simply not be tolerated.

My work in the field of community relations over the past 30 years has convinced me, Senators, that racial discrimination in housing is without a doubt the most explosive cause of racial disharmony in our society, and that is the principal reason why I support the Fair Housing Amendments Act of 1987.

I support an effective administrative remedy for individual victims of discrimination, which is in the proposed new act. I support the provision which would extend protection to the disabled persons and families with children. I agree that the 1968 act has deficiencies which need to be strengthened. But my approach to the problem goes beyond the need for technical and even substantive changes in the law.

I support the act because I believe that we must somehow stop this perception or perhaps the reality that civil rights and civil rights enforcement in this country continues to erode, and therefore I urge the Congress to once again declare with absolute clarity that we will no longer tolerate discrimination in housing and the violence that often accompanies it. How disgraceful, that 19 years after the enactment of the Civil Rights Act of 1968 we are still confronted with segregated racial patterns. We must do more, much more to resolve this problem once and for all.

[The prepared statement of Mr. Band follows:]

STATEMENT OF JORDAN C. BAND

April 2, 1987

My name is Jordan C. Band. I am the Vice Chairman and presiding officer of the Community Relations Board of the City of Cleveland, Ohio, the local public agency authorized by ordinance to safeguard civil rights and promote improvement of human relations in Cleveland. Under our ordinance, our Mayor is the nominal Chairman, but does not participate in the deliberations of the Board.

For almost 30 years I have been engaged as a volunteer in efforts to improve community relations and protect human rights in Cleveland and elsewhere in the United States. This included efforts to achieve fair housing legislation in Ohio long before the enactment of the Civil Rights Act of 1968. At that time, I was a part of the combined effort of the civil rights movement in Ohio sponsoring fair housing, and I testified before an Ohio legislative committee on the bill which eventually became the Fair Housing Law of Ohio.

I appear today in support of the Fair Housing Amendments Act of 1987, primarily for three reasons. It is my feeling that we as a nation have not succeeded in eradicating housing discrimination in this country or even in impressing on large numbers of people that the fair housing laws will be effectively enforced. We need to send a strong message that the day has passed when discrimination in housing will be tolerated by public authorities.

Secondly, it is my belief that housing discrimination is the key to many other forms of prejudice, discrimination and even violence against minorities. If we cannot solve this problem, civil rights enforcement and awareness will continue to erode across the board.

Lastly, I am here because I believe that the experiences which I can report from Cleveland will be helpful to you in considering this legislation.

Cleveland was one of the first cities in America to establish a Community Relations Board to bring an end to racism and discrimination following World War II. It is a city where for 40 years we in community relations have been attempting to deal with problems of housing discrimination with very mixed results. Despite the existence of the Fair Housing Law adopted as Title VIII of the Civil Rights Act of 1968, despite the existence of a state Fair Housing Law adopted in Ohio many years ago, and despite all the efforts of community leaders to educate the public on the existence of these laws and the moral imperatives which made them necessary, housing discrimination persists.

I have no way of estimating the number of local incidents of housing discrimination based on race. Many, of course, go unreported. Some simply result in depriving families or individuals of their lawful right to live in neighborhoods of their choice, without violence. But all too many produce incidents of vandalism, intimidation and physical violence.

In the City of Cleveland in 1986 there were 77 violent incidents in which our staff at the Community Relations Board found substantial evidence of racial motivation as a primary and significant factor. Most of them involved neighborhood confrontations following attempts by minorities to move into mostly white neighborhoods. They involved arson, attempted arson, firing of weapons, cross burnings, paint spray damage, threatening letters, threatening graffiti, broken windows and all of the other traditional methods of threats and menacing.

And the problem seems to be growing, despite considerable media attention, despite strong editorial support and expressions of community outrage from civic leaders and despite good cooperation from the police. Last year's 77 incidents compare with 50 reported in 1985 and 24 in 1984.

One such incident, which attracted national attention last year, involved a gang of unruly neighbors who terrorized a black family which had recently moved into the neighborhood. The incident started with bottle throwing, paint spray and racial epithets and soon escalated into gun shots, threats and intimidation. There was a happy ending to that incident when, as a result of enormous coordinated community effort, the residents of the neighborhood called a press conference to publicly deplore the violence, to welcome the black family and urged them to remain in the neighborhood. Even the individuals who were a part of the hostility joined in the welcome and asked for forgiveness. But this was an exception.

Another incident, which would have been humorous if it were not so pathetic, involved the outright refusal to offer housing to a black lawyer whose work consists of fair housing law enforcement, and who was blatantly and openly refused an apartment on the ground of race, even after he explained to the landlord what he does for a living. Suffice it to say that the landlord changed his mind a few days later.

But, most tragic of all was an incident which occurred in June, 1985 when a Cleveland black family--husband, wife and children were burned out of their home simply because they exercised their right to live in peace in a neighborhood of their choice. And in that fire, the husband's mother, Mabel Gant--was burned to death. The perpetrator of that terrible act has never been brought to justice.

The mission and the activities of the Cleveland Community Relations Board are directed toward reducing intergroup tensions leading to racially motivated violence. Most of this tension is housing related. Our staff works closely with law enforcement officers and local residents to provide support for the victims and to develop cooperative programs for neighborhood improvement. All too often community groups and elected officials tend to separate racial issues from their other priorities. Some of them see the problem of racial tension as passe. Not true.

Our goal in Cleveland is to make the community aware of the importance of reducing racial hostilities as a part of the overall agenda for neighborhood improvement. However, until our community and other communities can be made to understand that--even without violence--housing discrimination is a crime--and that perpetrators will be punished, we will no doubt be faced in the future with other outrageous acts of racial motivated violence.

Cleveland is about to adopt a local fair housing ordinance. In the past we thought we didn't need one, mainly because of the existence of state and federal fair housing laws. But it is now apparent that in the case of the massive and enormously complicated problems of housing discrimination, every branch of government--federal, state and local--must continue to make strong statements--expressions of public policy--that housing discrimination will simply not be tolerated.

It is my view that a local fair housing ordinance, alongside of effective state and federal laws, will forcefully emphasize at the local level the absolute right of persons of all races to live in every section of the community without fear of racial violence.

I am also a past national Chairman of the National Jewish Community Relations Advisory Council, known by its

initials as NJCRAC. That organization, which is the joint planning and coordinating body in the field of Jewish community relations, consists of the eleven leading national and 113 local community agencies dealing with human relations issues in the United States. While I am not authorized to speak on behalf of NJCRAC, I can state that for many years it has strongly supported the concept of fair housing. A strategic goal outlined in its 1985-1986 Joint Program Plan was to "build support for strengthening fair housing legislation"--a goal that remains effective today. One of its strategic goals for 1986-1987 is to "seek vigorous enforcement of federal civil rights laws by federal enforcement agencies".

My work in the field of community relations over the past 30 years has convinced me that racial discrimination in housing is without a doubt the most explosive cause of racial disharmony in our society. And that is the principal reason why I support the Fair Housing Amendments Act of 1987. I support an effective administrative remedy for individual victims of discrimination. I support the provision which would extend protection to disabled persons and families with children. I agree that the 1968 Act has deficiencies which need to be strengthened. But my approach to this problem goes beyond the need for technical and even substantive changes in the law.

I support the Act because I believe that we must somehow stop this perception (or is it a reality?) that civil rights and civil rights enforcement in this country are both continuing to erode. The time has come for the Congress to declare once again with absolute clarity, that this nation will no longer tolerate discrimination in housing and the violence which often accompanies it. How

disgraceful that 19 years after enactment of the Civil Rights Act of 1968, we are still confronted with segregated racial patterns. We must do more--much more--to resolve this problem once and for all.

Senator SIMON. I thank you very much.

Mr. Homer Floyd, the executive director of the Pennsylvania Human Rights Commission is not able to be here, and we have his assistant, Mr. Hain instead.

We are very happy to have you with us, Mr. Hain.

STATEMENT OF HENRY HAIN

Mr. HAIN. Thank you, Senator Simon. I am Henry F. Hain, director of the housing division for the Pennsylvania Human Relations Commission. I am representing the executive director, Homer Floyd, who was unable to be present today.

The commission enforces anti-discrimination laws in Pennsylvania, including, of course, fair housing laws.

Senator SIMON. Would you please pull that microphone a little closer to you?

Mr. HAIN. The commission strongly supports S. 558 which we believe will have a positive impact on equal housing opportunity in four major ways.

First, the bill would enhance Federal enforcement in several important ways. The improved enforcement authority is crucial to the victims of discrimination. Discrimination based on race, sex, and ethnic origin remains a major problem throughout this Nation.

Most often, the victims of such discrimination lack the resources to pursue independent legal action to secure redress. This bill would at last provide a vehicle for securing redress through administrative enforcement mechanisms.

The most important improvement in the enforcement procedure is the establishment of a full administrative hearing process, through which compensatory damages and punitive damages may be awarded where appropriate.

In addition to assuring victims that meaningful remedies are available, such remedial authority is a powerful deterrent against discrimination.

Only the most persistent complainants have any hope of obtaining a full remedy under the current administrative process. And then, it is often only by going beyond that process to initiate actions in Federal court that a victim obtains any meaningful personal compensation for an injury, for the housing sought is often sold or rented before an investigation is even started, and most victims must be motivated to pursue a complaint on principals or monetary damages alone, and at the same time, of course, find alternative housing.

We in Pennsylvania have found that the sure expectation of a hearing provides a strong incentive for respondents to conciliate complaints.

The proposed amendments would authorize the Secretary of HUD to initiate investigations and complaints. The Pennsylvania commission has found this to be an extremely useful and necessary tool, particularly in the area of housing discrimination. Pennsylvania has found many individual victims of housing discrimination are treated so courteously that they are not aware that they have been denied information about available housing or steered to a particular neighborhood.

Sometimes the pressure to find housing and moving takes precedent over taking the time to file a complaint.

The proposed amendments also provide administrative redress for victims of housing and racial intimidation and violence. Such incidents are on the increase nationally, including Pennsylvania, where we have had the same problem that Mr. Band has reported in Cleveland, only ours are across the State.

Second, the issue of expanded protection is something I would like to address. Offering protected class status to the handicapped under title VIII is a long overdue recognition of the invidious discrimination in housing against the physically and mentally handicapped.

In Pennsylvania, complaints filed by handicapped individuals are now a significant portion of our housing caseload. In 1986, fully 14 percent of our housing caseload was represented by such complaints.

More significant than the number of complaints we have received are the number that we have not received. The physically handicapped in particular are often denied access to the full housing market before even attempting to rent or purchase specific properties. Barriers loom in such profusion that time and energy are exhausted in the search of units which at least appear to hold the promise of accessibility.

Senator SIMON. If you could complete your statement, it would be appreciated.

Mr. HAIN. I go on to mention also that we strongly support antidiscrimination against families with children. I refer you to our written testimony for our reasons there.

I would note that cooperative efforts between the Federal, State, and local governments as established by the amendments are of extreme importance to State agencies.

In closing, I would mention the point that it is extremely important to States that the Federal Government establish a leadership role in fair housing legislation. During the last 3 years, our Commission experienced a detailed legislative review of its statutory authority, and throughout this review legislators continue to ask us what are the Feds doing? They were prepared to conform our act to the Federal act but not prepared to go beyond the Federal act.

Thank you.

[The prepared statement of Mr. Floyd, submitted by Mr. Hain, follows:]

PREPARED STATEMENT OF HOMER C. FLOYD
EXECUTIVE DIRECTOR
PENNSYLVANIA HUMAN RELATIONS COMMISSION

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE ON THE CONSTITUTION, THANK YOU FOR GIVING ME THE OPPORTUNITY TO TESTIFY HERE TODAY ON BEHALF OF THE FAIR HOUSING AMENDMENTS OF 1987.

I AM HOMER C. FLOYD, EXECUTIVE DIRECTOR OF THE PENNSYLVANIA HUMAN RELATIONS COMMISSION, AN AGENCY OF THE COMMONWEALTH OF PENNSYLVANIA. I ALSO SERVE AS THE TREASURER ON THE BOARD OF DIRECTORS OF THE INTERNATIONAL ASSOCIATION OF OFFICIAL HUMAN RIGHTS AGENCIES (IAOHRA) AND HAVE SERVED AS A MEMBER OF THE ASSOCIATION'S FEDERAL LIAISON COMMITTEE. DURING THE LAST 24 YEARS I HAVE DIRECTED TWO CITY HUMAN RIGHTS AGENCIES AND TWO STATE HUMAN RIGHTS AGENCIES. IN ADDITION, I WAS ONE OF FIVE CONSULTANTS ASKED BY THE ORIGINAL COMMISSIONERS OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, DURING JUNE AND JULY OF 1965, TO ASSIST THAT COMMISSION IN TAKING THE INITIAL STEPS TO BECOME OPERATIONAL.

ABOUT THE PENNSYLVANIA HUMAN RELATIONS COMMISSION

THE PENNSYLVANIA HUMAN RELATIONS COMMISSION (PHRC) IS THE OFFICIAL STATE AGENCY IN OUR COMMONWEALTH WITH LAW ENFORCEMENT RESPONSIBILITY IN PREVENTING AND ELIMINATING UNLAWFUL DISCRIMINATION. OUR COMMISSION ADMINISTERS THE PENNSYLVANIA HUMAN RELATIONS ACT (PHR ACT) AND THE FAIR EDUCATIONAL OPPORTUNITY ACT, WHICH TOGETHER PROHIBIT DISCRIMINATION IN EMPLOYMENT, HOUSING, PUBLIC ACCOMMODATIONS, AND EDUCATION. IN HOUSING, OUR ACT PROHIBITS DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, ANCESTRY, NATIONAL ORIGIN, SEX, HANDICAP/DISABILITY, USE OF A GUIDE ANIMAL BECAUSE OF THE BLINDNESS OR DEAFNESS OF THE USER, USE OF A SUPPORT ANIMAL DUE TO THE PHYSICAL HANDICAP TO THE USER, AND TRAINING AND HANDLING SUPPORT OR GUIDE ANIMALS. THE SAME CLASSES ARE PROTECTED REGARDING REAL ESTATE TRANSACTIONS IN THE AREA OF COMMERCIAL PROPERTY. PENNSYLVANIA ALSO OFFERS PARTIAL

PROTECTION TO FAMILIES BY PROHIBITING EVICTION ACTIONS BEFORE THE END OF A LEASE BECAUSE OF PREGNANCY OR THE BIRTH OF A CHILD.

THE COMMISSION HAS BEEN IN OPERATION SINCE 1955 AND ACTIVE IN THE AREA OF HOUSING SINCE 1961 WHEN OUR ACT WAS AMENDED TO INCLUDE PROHIBITIONS AGAINST DISCRIMINATION IN HOUSING AND LENDING. THE PHR ACT WAS AMONG THE FIRST RECOGNIZED AS SUBSTANTIALLY EQUIVALENT TO TITLE VIII OF THE CIVIL RIGHTS ACT OF 1968 BY THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT.

LIKE HUD, THE COMMISSION IS AUTHORIZED TO INVESTIGATE COMPLAINTS FILED BY PERSONS CLAIMING TO BE AGGRIEVED BY VIOLATIONS OF THE PHR ACT AND TO CONCILIATE THOSE COMPLAINTS WHERE THE STAFF DETERMINES THAT PROBABLE CAUSE EXISTS TO CREDIT THE COMPLAINANTS ALLEGATIONS. UNLIKE HUD, THE COMMISSION IS EMPOWERED TO INITIATE ITS OWN COMPLAINTS WHERE IT BELIEVES THAT UNLAWFUL DISCRIMINATORY PRACTICES ARE OCCURRING, TO HOLD PUBLIC HEARINGS WHEN COMPLAINTS CANNOT BE APPROPRIATELY RESOLVED THROUGH CONCILIATION EFFORTS, AND TO ISSUE AND MONITOR COURT ENFORCEABLE, FINAL ORDERS AND DECREES FOLLOWING PUBLIC HEARINGS WHERE ILLEGAL DISCRIMINATION HAS BEEN FOUND.

REASONS FOR SUPPORTING S.558

THE PHRC STRONGLY SUPPORTS S.558, THE LEGLISLATION WHICH IS BEFORE YOU TODAY. WE BELIEVE THAT PASSAGE OF THIS BILL WOULD BE A SIGNIFICANT STEP IN SUPPORTING EQUAL OPPORTUNITY IN HOUSING.

AS WE SEE IT, THIS BILL WILL HAVE A POSITIVE IMPACT ON EQUAL HOUSING OPPORTUNITY IN FOUR MAJOR WAYS.

FIRST, IT PROVIDES FEDERAL PROTECTION FOR GROUPS WHICH HAVE NOT PREVIOUSLY BEEN COVERED BY FEDERAL EQUAL HOUSING OPPORTUNITY LAWS.

SECOND, IT STRENGTHENS THE FEDERAL ENFORCEMENT MECHANISMS IN THE AREA OF EQUAL HOUSING OPPORTUNITY.

THIRD, IT PROVIDES A FOUNDATION FOR STRENGTHENING FEDERAL-STATE COOPERATIVE EFFORTS IN THE AREA OF EQUAL HOUSING OPPORTUNITY.

FOURTH, IT SERVES AS A MODEL FOR STATE AND LOCAL GOVERNMENTS IN DEVELOPING THEIR OWN LAWS AND ENFORCEMENT PROCEDURES.

LET ME ADDRESS EACH OF THESE FACTORS.

EXPANDED PROTECTION

S.558 EXPANDS FEDERAL PROTECTION AGAINST DISCRIMINATION IN HOUSING TO TWO GROUPS WHICH HAVE PREVIOUSLY NOT BEEN PROTECTED: INDIVIDUALS WITH HANDICAPS OR DISABILITIES, AND CHILDREN. BOTH GROUPS ARE FREQUENT VICTIMS OF DISCRIMINATION IN HOUSING, AND BOTH GROUPS NEED AND SHOULD HAVE ENFORCEABLE FEDERAL RIGHTS.

SINCE 1974, THE PHRC HAS HAD JURISDICTION OVER HOUSING DISCRIMINATION BASED ON "HANDICAP OR DISABILITY." THROUGH REGULATION, THE COMMISSION DEFINES THESE TERMS IN A MANNER SIMILAR TO SECTION 5(B)(H) IN THESE PROPOSED AMENDMENTS. GIVING PROTECTED CLASS STATUS TO THE HANDICAPPED UNDER TITLE VIII IS A LONG OVERDUE RECOGNITION OF THE INVIDIOUS DISCRIMINATION IN HOUSING AGAINST THE PHYSICALLY AND MENTALLY HANDICAPPED.

IN PENNSYLVANIA, COMPLAINTS FILED BY HANDICAPPED INDIVIDUALS ARE A SIGNIFICANT PROPORTION OF OUR HOUSING CASELOAD. IN 1986, 14% OF OUR HOUSING CASELOAD REPRESENTED SUCH COMPLAINTS.

MORE SIGNIFICANT THAN THE NUMBER OF COMPLAINTS WE HAVE RECEIVED ARE THE NUMBER WE DO NOT RECEIVE. THE PHYSICALLY HANDICAPPED ARE OFTEN DENIED ACCESS TO THE FULL HOUSING MARKET BEFORE EVEN ATTEMPTING TO RENT OR PURCHASE SPECIFIC PROPERTIES. BARRIERS LOOM IN SUCH PROFUSION THAT TIME AND ENERGY ARE EXHAUSTED IN THE SEARCH FOR UNITS WHICH AT LEAST APPEAR TO HOLD THE PROMISE OF ACCESSIBILITY. INACCESSIBLE REAL ESTATE OFFICES ALONE SEVERLY LIMIT ACCESS TO THE MARKET. COUPLED WITH THE INACCESSIBILITY OF THE MAJORITY OF HOUSING CONTROLLED BY SUCH OFFICES, THERE ARE IN EFFECT SIGNS EVERYWHERE SAYING "NO HANDICAPPED NEED APPLY."

ONCE FOCUSED ON SPECIFIC HOUSING, HANDICAPPED INDIVIDUALS MAY BE MET WITH BLATANT DISCRIMINATION. A BLIND RENTAL APPLICANT MAY BE REFUSED A UNIT BECAUSE OF USE OF A GUIDE DOG - THEN TOLD THE DOG WILL BE ACCEPTED IF THE PERSON AGREES TO PAY A DOUBLE SECURITY DEPOSIT. OTHERS ARE NOT THIS GENEROUS. A BLIND APPLICANT FOR GOVERNMENT SUBSIDIZED HOUSING WAS DENIED A UNIT BASED ON HIS HOUSEKEEPING. MANAGEMENT FOUND THAT HIS CLOTHES WERE PILED AROUND HIS BEDROOM RATHER THAN IN DRAWERS. MOREOVER, HIS ROOM WAS BARELY LIGHT. WHY THE ROOM WAS DARK, I NEED NOT EXPLAIN. THE CLOTHES WERE NEATLY PILED, OF COURSE, TO ENABLE THE MAN TO EASILY FIND PROPER ATTIRE SO HE COULD DRESS HIMSELF.

MENTALLY HANDICAPPED PERSONS ARE LARGELY DEPENDENT UPON GOVERNMENT SUBSIDIZED HOUSING. DESPITE THIS, THEY FACE OBSTACLES SECURING THE VERY HOUSING THE STATE AND FEDERAL GOVERNMENTS HAVE BUILT FOR THE HANDICAPPED. A WOMAN WHO WAS EMPLOYED AND HAD LIVED INDEPENDENTLY FOR SEVERAL YEARS, BUT HAPPENED TO BE MENTALLY RETARDED, WAS DECLARED BY A RENTAL MANAGER TO BE INCAPABLE OF INDEPENDENT LIVING. ALTHOUGH PROFESSIONALS ASSURED THE MANAGER THAT SHE WAS QUITE CAPABLE, THE MANAGER PERSISTED IN REFUSING TO RENT. MENTALLY HANDICAPPED APPLICANTS MAY ALSO BE SUBJECT TO UNREASONABLE HOUSEKEEPING STANDARDS, OR REASONABLE STANDARDS DISCRIMINATORILY APPLIED, AS A BASIS FOR DENYING THEM HOUSING.

THE MAJOR OBSTACLE OF THE MENTALLY HANDICAPPED IS, OF COURSE, COMMUNITY LIVING ARRANGEMENTS. THESE CASES INVOLVE EFFORTS BY SPECIALIZED HOUSING PROVIDERS TO SECURE SUCH FACILITIES FOR THEIR CLIENTS. THESE EFFORTS ARE ROUTINELY FRUSTRATED BY MUNICIPALITIES WHICH EITHER HAVE DISCRIMINATORY ZONING ORDINANCES AGAINST SUCH HOUSING, OR WHICH DISCRIMINATORILY INTERPRET OR APPLY NON-DISCRIMINATORY ORDINANCES, OR WHICH USE OTHER MUNICIPAL AUTHORITY TO DENY USE OF THE FACILITY TO THE MENTALLY HANDICAPPED. SEVERAL OF OUR CASES ALSO INVOLVED PRIVATE APARTMENT COMPLEXES REFUSING TO ACCEPT THIRD PARTY PAYMENTS ONLY AFTER LEARNING THAT THE TENANTS WOULD BE MENTALLY RETARDED. INTERACTIONS WITH RENTAL AND SALES AGENTS OFTEN RESULT IN MORE SUBTLE DISCRIMINATION: PATERNALISTIC STEERING, RELUCTANT DEALING, MISINFORMATION, CHRONIC LOSS OF SALES ENTHUSIASM, ETC. PHYSICALLY

HANDICAPPED PERSONS MAY BE PERCEIVED AS MENTALLY RETARDED, INCAPABLE OF INDEPENDENT LIVING, AN ENVIRONMENTAL BLIGHT, BOTHERSOME, FINANCIAL RISKS - AND MORE. MENTALLY RETARDED PERSONS ARE, IN ADDITION, OFTEN VIEWED AS PRONE TO CRIMINAL BEHAVIOR, OR AT LEAST SOCIALLY DESPICABLE BEHAVIOR.

SALES DISCRIMINATION, WHILE NOT AS FREQUENT AS RENTAL DISCRIMINATION, ALSO EXISTS. OUR WORST CASE INVOLVED A GENTLEMAN WHO WAS TOTALLY PARAPLEGIC. A COMMUNITY ASSOCIATION REFUSED TO APPROVE THE SALE OF A HOME TO HIM ALLEGEDLY ON THE GROUNDS OF HIS CONVICTION ON AN ASSAULT AND BATTERY CHARGE YEARS BEFORE HIS PRESENT CONDITION. THE ASSOCIATION ALSO BELIEVED THAT THE ACCOMMODATIONS NECESSITATED BY HIS WHEELCHAIR WOULD LOWER THE RESALE VALUE OF THE HOUSE AND THEREBY LOWER THE VALUE OF THEIR HOMES.

ONCE HOUSED, THE HANDICAPPED MAY FACE ADDITIONAL PROBLEMS. WE KNOW OF A RENTAL MANAGER WHO LITERALLY STOLE AND HID A TENANT'S MOTORIZED WHEELCHAIR BECAUSE IT WAS SCUFFING THE HALL WALLS. THE MANAGER'S SON WAS FOUND USING THE WHEELCHAIR AS A TOY. SUCH INDIGNITIES WERE ALSO INFLICTED WHEN TENANTS IN A BUILDING FOR THE BLIND WERE DENIED KEYS TO THEIR INDIVIDUAL APARTMENTS, OR A TENANT IS EVICTED BECAUSE HIS WHEELCHAIR CAUSES UNUSUAL NOISE.

WE HAVE ALSO HAD CASES WHERE TENANTS NEEDING HOME CARE ATTENDANTS WERE THREATENED WITH EVICTION BECAUSE THE ATTENDANTS WERE VIEWED AS UNAUTHORIZED CO-TENANTS. IN ANOTHER CASE, A MENTALLY RETARDED TENANT WAS PERMITTED BY THE MANAGEMENT TO BE SEXUALLY HARASSED BY OTHER TENANTS AND NON-TENANTS. THEN THERE WAS THE MOBILE HOME OWNER WHO AGREED TO BUILD A RAMP FOR A TENANT SO HE COULD ACCESS HIS MAILBOX. THE TENANT PAID IN ADVANCE FOR THE CONSTRUCTION, BUT THE "RAMP" WAS NOT WIDE ENOUGH TO ACCOMMODATE THE TENANTS WHEELCHAIR, IMPROPERLY INCLINED, AND ENDED IN A MUDDY AREA BEFORE REACHING THE MAILBOX. THE TENANT WAS PARAPLEGIC AMPUTEE WITH EPILEPSY. THE OWNER REFUSED TO CORRECT THE DEFICIENCIES.

THESE EXAMPLES SHOW THE SURFACE OF A PROBLEM WHOSE DEPTHS ARE AS INSTITUTIONALIZED AS RACIAL OR SEXUAL DISCRIMINATION.

HANDICAPPED INDIVIDUALS HAVE NO PROTECTION IN THE AREA OF PRIVATE HOUSING IN MANY STATES AND LOCALITIES THROUGHOUT THE UNITED STATES. ONLY 28 STATES AND FEWER THAN 50 LOCAL GOVERNMENTS OFFER SUCH PROTECTION.

AS DISABLED PEOPLE ACHIEVE PROGRESS IN EMPLOYMENT, ACCESS TO TRANSPORTATION, AND OTHER AREAS, WE EXPECT INCREASED PARTICIPATION OF INDEPENDENT DISABLED INDIVIDUALS IN THE HOUSING MARKET AND AN INCREASED NEED FOR PROTECTION AGAINST HOUSING DISCRIMINATION.

THE PROPOSED LEGISLATION IS AN IMPORTANT STEP TO ADDRESS AND CORRECT THESE PROBLEMS.

PROTECTION OF FAMILIES WITH CHILDREN IS ALSO A MAJOR STEP FORWARD. THE PHR ACT DOES NOT INCLUDE SUCH PROTECTION, EXCEPT FOR A RECENTLY-ADDED PROTECTION AGAINST EVICTION DURING THE TERM OF A LEASE IF A TENANT HAS A BABY. RECENT EFFORTS TO ADD COVERAGE IN PENNSYLVANIA LAW OR FAMILIES WITH CHILDREN WERE UNSUCCESSFUL. IT IS CLEAR THAT THERE ARE SITUATIONS, PARTICULARLY IN URBAN AREAS, WHERE FAMILIES WITH CHILDREN ARE EXCLUDED FROM APARTMENTS OR HOUSING COMPLEXES, OR WHERE THEY HAVE TO HIDE THEIR CHILDREN TO AVOID EVICTION. IF AS A NATION WE VALUE OUR CHILDREN, WE OUGHT TO GUARANTEE THEIR RIGHT TO HOUSING.

DISCRIMINATION AGAINST FAMILIES WITH CHILDREN IS THE MOST PREVALENT FORM OF HOUSING DISCRIMINATION IN OUR NATION TO BE LARGELY IGNORED ON ALL LEVELS OF GOVERNMENT. ONLY 7 STATES HAVE HAD THE COURAGE TO PROTECT FAMILIES WITH CHILDREN.

RATHER THAN DUPLICATE THE STATISTICS OTHERS WILL OFFER IN SUPPORT OF THE GROWING CRISIS THIS FORM OF DISCRIMINATION IS SPAWNING, I WOULD LIKE TO MAKE SEVERAL OBSERVATIONS YOU MAY NOT HEAR.

FIRST, THIS FORM OF DISCRIMINATION IMPACTS RATHER BROADLY. ITS MOST PROFOUND IMPACT IS ON FEMALE-HEADED HOUSEHOLDS AND OTHER FAMILIES WHOSE HOUSING CHOICES ARE ALREADY SERIOUSLY LIMITED BY ECONOMIC MEANS. BUT IT ALSO INJURES MIDDLE AND HIGHER INCOME FAMILIES. THE LATTER MAY NOT BE

TRAPPED IN THE RENTAL MARKET, BUT ARE LIKELY TO FIND THAT INCOME ALONE WILL NOT NECESSARILY BUY THEM THE HOUSING OF THEIR CHOICE SHOULD THAT CHOICE INCLUDE CONDOMINIUMS AND OTHER FACILITIES WHICH EXCLUDE CHILDREN. SO TOO, HIGHER INCOME FAMILIES WHOSE CAREERS REQUIRE MOBILITY, OR WHO WISH TO PURSUE A LIFE STYLE FREE OF THE RESPONSIBILITIES OF HOME OWNERSHIP, ARE OFTEN FORCED TO BUY IN ORDER TO PROVIDE HOUSING FOR THEIR CHILDREN.

SECONDLY, THE FAMILIES MOST PROFOUNDLY IMPACTED ARE THOSE OF LOW AND MODERATE MEANS WHO ALREADY MUST COMPETE IN THE SHRINKING RENTAL MARKET OF UNITS THEY CAN AFFORD. WOMEN AND MINORITIES, WHO ARE DISPROPORTIONATELY REPRESENTED IN THIS GROUP, ENTER THIS MARKET FURTHER BURDENED WITH DISCRIMINATION PROBLEMS BASED ON RACE OR SEX. IN FACT, OUR EXPERIENCE HAS BEEN THAT DISCRIMINATION BASED ON FAMILIAL STATUS IS OFTEN USED AS A PRETEXT FOR DISCRIMINATION AGAINST MINORITIES AND WOMEN; AND HAS ALSO BEEN USED INTENTIONALLY BECAUSE OF ITS ACTUAL OR PERCEIVED ADVERSE IMPACT ON MINORITIES AND WOMEN - HEADED HOUSEHOLDS.

THIRDLY, I WOULD ASK THIS SUBCOMMITTEE TO BEAR IN MIND THAT DISCRIMINATION IS OFTEN A RESULT OF STEREOTYPES AND POOR GENERALIZATIONS. THE WHOLESALE EXCLUSION OF OUR CHILDREN FROM A GROWING PROPORTION OF OUR HOUSING RESOURCES RESTS ON THE BELIEF OF SOME HOUSING PROVIDERS THAT ALL CHILDREN ARE DESTRUCTIVE AND NOISY, OR THAT ACTING ON THIS GENERALIZATION IS EASIER THAN JUDGING EACH FAMILY ON ITS OWN MERITS. BUT JUST AS TITLE VIII DOES NOT REQUIRE THAT ONE MUST RENT OR SELL TO AN APPLICANT BECAUSE THEY BELONG TO A PROTECTED CLASS, THE PROPOSED AMENDMENT DOES NOT REQUIRE THAT ONE MUST RENT OR SELL TO ANY FAMILY WITH CHILDREN. IT PROHIBITS ONLY DENYING HOUSING FOR THAT REASON ALONE.

HENCE, HOUSING PROVIDERS WILL BE REQUIRED TO ENGAGE IN THE SAME RATIONAL BUSINESS PRACTICES MANDATED FOR OTHER PROTECTED CLASSES UNDER TITLE VIII: EXPLICITY DEFINE THEIR CRITERIA, DEVELOP A UNIFORM PROCEDURE FOR CONFIRMING WHETHER OR NOT AN APPLICANT MEETS THE CRITERIA, AND APPLY THE CRITERIA UNIFORMLY TO ALL APPLICANTS. IF, IN ADDITION TO INCOME, CREDIT, AND OTHER CONCERNS, A HOUSING PROVIDER WISHES TO ASSURE THAT AN INDIVIDUAL

OR A FAMILY (WITH OR WITHOUT CHILDREN) IS NOT DESTRUCTIVE OR NOISY, THAT DETERMINATION SHOULD AND COULD BE MADE IRRESPECTIVE OF THE AGE OF ITS POTENTIAL SOURCE.

LASTLY, I WOULD LIKE TO OBSERVE THAT OUR EXPERIENCE IN PENNSYLVANIA HAS SHOWN THAT THE VOICES OF INDIVIDUAL FAMILIES COMPLAINING ABOUT FAMILIAL STATUS DISCRIMINATION ARE MANY. THESE VOICES HAVE NOT, HOWEVER, ORGANIZED THEMSELVES INTO A CONCERTED DEMAND FOR AN END TO SUCH DISCRIMINATION. I WOULD HOPE THIS SUBCOMMITTEE FOCUSES ON THE SERIOUSNESS OF THE PROBLEM RATHER THAN THE ORGANIZATIONAL STRENGTH OF ITS VICTIMS.

ENHANCEMENT OF FEDERAL ENFORCEMENT EFFORTS

S.558 WOULD ENHANCE FEDERAL ENFORCEMENT CAPABILITY IN SEVERAL VERY IMPORTANT WAYS.

THE IMPROVED ENFORCEMENT AUTHORITY IS CRUCIAL FOR THE VICTIMS OF DISCRIMINATION. HOUSING DISCRIMINATION BASED ON RACE, SEX AND ETHNIC ORIGIN REMAINS A MAJOR PROBLEM THROUGHOUT THE NATION. MOST OFTEN, THE VICTIMS OF SUCH DISCRIMINATION LACK THE RESOURCES TO PURSUE INDEPENDENT LEGAL ACTION TO SECURE REDRESS. S.558 PROVIDES A VEHICLE FOR SECURING REDRESS THROUGH ADMINISTRATIVE ENFORCEMENT MECHANISMS.

THE PROPOSED AMENDMENTS WOULD AUTHORIZE THE SECRETARY OF HUD TO INITIATE INVESTIGATIONS AND COMPLAINTS. THE PHRC HAS THE AUTHORITY TO INITIATE COMPLAINTS AND HAS FOUND THIS TO BE AN EXTREMELY USEFUL ENFORCEMENT TOOL, PARTICULARLY IN THE AREA OF HOUSING DISCRIMINATION.

IN PENNSYLVANIA, WE HAVE FOUND THAT INDIVIDUAL VICTIMS OF HOUSING DISCRIMINATION OFTEN ARE NOT IN A POSITION TO FILE COMPLAINTS. SOMETIMES, THEY ARE TREATED SO COURTEOUSLY THAT THEY ARE NOT AWARE THAT THEY HAVE BEEN DENIED INFORMATION ABOUT AVAILABLE HOUSING, OR STEERED TO A PARTICULAR TYPE OF NEIGHBORHOOD OR UNIT. SOMETIMES, THE PRESSURE TO FIND HOUSING AND MOVE IN TAKES PRECEDENCE OVER TAKING THE TIME TO FILE A COMPLAINT. SOMETIMES, PEOPLE FEAR RETALIATION IF THEY FILE A COMPLAINT. WE HAVE FOUND THAT

COMMISSION-INITIATED COMPLAINTS PROVIDE A VEHICLE FOR ADDRESSING DISCRIMINATION AND ESTABLISHING NON-DISCRIMINATORY PRACTICES IN SITUATIONS WHERE A COMPLAINT IS NOT FILED BY AN INDIVIDUAL VICTIM OF DISCRIMINATION.

THE MOST IMPORTANT IMPROVEMENT IN THE ENFORCEMENT PROCEDURES IS THE ESTABLISHMENT OF AN ADMINISTRATIVE HEARING PROCESS. IN PENNSYLVANIA WE HAVE AN ADMINISTRATIVE HEARING PROCESS WHICH, LIKE S.558, RESULTS IN ORDERS WHICH MAY BE APPEALED OR ENFORCED IN COURT. SUCH A PROCESS FACILITATES ENFORCEMENT AND REMEDY WHERE DISCRIMINATION IS FOUND. THE CURRENT FEDERAL PROCEDURE FORCES VICTIMS OF DISCRIMINATION TO TAKE THEIR OWN CASES TO COURT IF CONCILIATION EFFORTS FAIL. MANY INDIVIDUALS CANNOT AFFORD THE TIME OR MONEY TO TAKE THAT ACTION AND THEREFORE HAVE NO REAL REDRESS. ADMINISTRATIVE HEARINGS CAN ASSURE THAT THE COMPLAINT IS ADJUDICATED AND REMEDIED IF DISCRIMINATION IS FOUND. THE ADMINISTRATIVE HEARING ALSO RELIEVES THE ALREADY-OVERLOADED COURTS FROM HAVING TO HEAR THESE CASES. FURTHERMORE, WE IN PENNSYLVANIA HAVE FOUND THAT THE SURE EXPECTATION OF A HEARING PROVIDES A STRONG INCENTIVE FOR RESPONDENTS TO CONCILIATE COMPLAINTS; THE VAST MAJORITY OF CASES WE APPROVE FOR HEARING ARE, IN FACT, CONCILIATED PRIOR TO THE HEARING.

ENFORCEMENT IS ALSO ENHANCED BY OTHER PROVISIONS WHICH FACILITATE THE ACCESS OF VICTIMS OF DISCRIMINATION TO SECURE REDRESS. BY PROVIDING FOR A COURT-APPOINTED ATTORNEY, AND ALLOWING FOR ATTORNEY'S FEES, THE PROPOSED AMENDMENTS ASSURE THAT ECONOMIC CONSIDERATIONS DO NOT BAR ACCESS TO THE COURTS WHERE NECESSARY.

THE LAST AREA OF ENHANCEMENT OF ENFORCEMENT EFFORTS WHICH I WOULD LIKE TO NOTE IS IN THE AREA OF REMEDIES. PERMITTING HUD TO AWARD BOTH COMPENSATORY AND PUNITIVE DAMAGES PROVIDES NOT ONLY FULL REMEDY FOR <u>PROVEN</u> DISCRIMINATION, BUT <u>ALSO</u> A POWERFUL DETERRENT AGAINST DISCRIMINATION.

ONLY THE MOST PERSISTENT COMPLAINANTS HAVE ANY HOPE OF OBTAINING A FULL REMEDY UNDER CURRENT ADMINISTRATIVE PROCESS. AND THEN, IT IS OFTEN ONLY BY GOING BEYOND THAT PROCESS TO THE PRIVATE LEGAL ACTION STAGE. CURRENTLY, A

VICTIM MUST USUALLY INITIATE A DE NOVO ACTION IN FEDERAL COURT TO OBTAIN ANY MEANINGFUL PERSONAL COMPENSATION FOR HIS/HER INJURY.

WITH THE HOUSING SOUGHT OFTEN SOLD OR RENTED BEFORE AN INVESTIGATION HAS BEEN STARTED, MOST VICTIMS MUST BE MOTIVATED TO PURSUE A COMPLAINT ON PRINCIPLES AND MONETARY DAMAGES ALONE - AND, AT THE SAME TIME, FIND ALTERNATIVE HOUSING. THE PROPOSED REMEDIES MAKE FILING A COMPLAINT FAR MORE FEASIBLE.

THE PROPOSED AMENDMENTS ALSO PROVIDE REDRESS FOR VICTIMS OF HOUSING-RELATED INTIMIDATION AND VIOLENCE. SUCH INCIDENTS ARE ON THE INCREASE NATIONALLY, INCLUDING PENNSYLVANIA WHERE WE HAD 40 REPORTED HOUSING-RELATED TENSION INCIDENTS LAST FISCAL YEAR, INCLUDING THREATS, GRAFFITI, FIREBOMBINGS, CROSS BURNINGS AND ASSAULT. MANY OTHERS, OF COURSE, GO UNREPORTED. PENNSYLVANIA HAS INCREASED THE PENALTY FOR CRIMINAL ACTS MOTIVATED BY RACIAL OR ETHNIC ANIMUS. THE APPROACH OF S.588 PROVIDES REDRESS FOR THE SPECIFIC VICTIMS OF SUCH TERRORISTIC ACTS.

FEDERAL-STATE COOPERATIVE EFFORTS

COOPERATIVE EFFORTS BETWEEN THE FEDERAL GOVERNMENT AND STATE AND LOCAL GOVERNMENTS ARE ALREADY ESTABLISHED IN THE SCHEME OF TITLE VIII, WHICH PROVIDES FOR DEFERRAL OF COMPLAINTS FOR PROCESSING FROM HUD TO SUBSTANTIALLY EQUIVALENT STATE AND LOCAL CIVIL RIGHTS AGENCIES. THE PROPOSED AMENDMENTS WILL ENHANCE THE EFFORTS OF SUCH STATE AND LOCAL AGENCIES BY PROVIDING FEDERAL BACK UP IN THE BROADENED AREAS OF JURISDICTION WHERE THEY COINCIDE WITH STATE OR LOCAL JURISDICTION, AND IN CASE PROCESSING THROUGH THE ADMINISTRATIVE HEARINGS. THE IMPROVED REMEDIAL RELIEF WILL INDIRECTLY AUGMENT THE ENFORCEMENT EFFORTS OF STATE AND LOCAL AGENCIES BY PROVIDING AN ADDITIONAL INCENTIVE TO RESPONDENTS TO ENCOURAGE EARLY SETTLEMENT AT THE STATE AND LOCAL LEVELS. FAILURE OF A RESPONDENT TO CONCILIATE WITH SUCH A STATE OR LOCAL AGENCY WILL PERMIT REACTIVATION OF THE CASE BY HUD AND THE IMPOSITION OF ITS ENFORCEMENT AND REMEDIAL POWERS.

PROVIDING THIS SUPPORT AT THE STATE AND LOCAL LEVELS WILL BE LESS COSTLY TO THE FEDERAL GOVERNMENT. NATIONALLY, ALMOST 70% OF THE FAIR HOUSING COMPLAINTS FILED ARE PROCESSED BY STATE AND LOCAL AGENCIES. THIS FIGURE IS IN THE 90% RANGE FOR MANY OF THE MORE POPULATED AREAS OF THE COUNTRY.

THE PROPOSED AMENDMENTS FACILITATE AND SUPPORT THE RESOLUTION OF COMPLAINTS AT THE STATE AND LOCAL LEVELS WHILE GUARANTEEING THE AVAILABILITY OF MEANINGFUL REMEDY THROUGH THE FEDERAL ENFORCEMENT PROCEDURES WHERE NECESSARY.

A MODEL FOR STATE AND LOCAL CIVIL RIGHTS PROGRAMS

THE VALUE OF S.558 AS A MODEL FOR STATE AND LOCAL GOVERNMENTS IN ESTABLISHING AND ENHANCING THEIR OWN CIVIL RIGHTS ENFORCEMENT PROGRAMS SHOULD NOT BE UNDERESTIMATED. DURING THE LAST THREE YEARS, THE PHRC EXPERIENCED A DETAILED LEGISLATIVE REVIEW OF ITS STAUTORY AUTHORITY AND ITS PROGRAMS. DURING THIS REVIEW, SEVERAL AMENDMENTS SIMILAR TO THOSE IN S.558 WERE CONSIDERED AND REJECTED. AMONG THEM WERE PROVIDING PROTECTION TO FAMILIES WITH CHILDREN AND AUTHORIZING THE AWARD OF COMPENSATORY DAMAGES AND ATTORNEY'S FEES. DURING THE DELIBERATIONS ON THOSE AMENDMENTS, AS WELL AS IN OTHER AMENDMENTS WHICH WERE ENACTED, A COMMON THEME WAS THE RELATIONSHIP TO FEDERAL LAW. OUR LEGISLATURE WAS RELUCTANT TO ENACT LEGISLATION WHICH WENT BEYOND FEDERAL LAW. ON THE OTHER HAND, IT WAS WILLING TO EXPAND PROTECTION TO CONFORM WITH FEDERAL LAW. STATE AND LOCAL GOVERNMENTS LOOK TO THE FEDERAL GOVERNMENT FOR LEADERSHIP; S.558 PROVIDES JUST THE SORT OF LEADERSHIP WHICH WE, AT THE STATE LEVEL, NEED.

IN CLOSING, LET ME STATE MY ENTHUSIASTIC AND EMPHATIC SUPPORT FOR S.558. NO GREATER RECOGNITION OF THIS FAIR HOUSING MONTH 1987 COULD BE MADE THAN THE SUPPORT OF THIS SUBCOMMITTEE FOR THE PASSAGE OF THIS MAJOR FEDERAL HOUSING LEGISLATION.

THANK YOU VERY MUCH FOR YOUR CONSIDERATION OF THESE REMARKS. WE URGE YOUR APPROVAL OF S.558.

Senator SIMON. Thank you, Mr. Hain.

I will ask the Senator from Arizona to introduce our third witness.

Senator DECONCINI. Mr. Chairman, thank you very much.

It is a great pleasure for me to introduce Councilwoman Mary Rose Wilcox.

Mary Rose, we are very pleased to have you here and we are gratified by the leadership you have provided for all of Arizona. In your testimony this afternoon I hope you will address the reaction of the housing industry in Phoenix to the survey that you conducted. In addition, if you could touch on what responsibility the city of Phoenix has assumed in addressing the problems that you are going to take up.

Unfortunately, time constraints require that we only have five minutes for your statement and the chairman will not count the 52 seconds that I have just spent, I am sure.

So will you proceed to summarize your statement and try to address those two questions for me.

Ms. WILCOX. Yes.

STATEMENT OF MARY ROSE WILCOX

Ms. WILCOX. Senator DeConcini, Senator Simon, I am honored to appear before you as a representative of the city of Phoenix to take part in this discussion of fair housing opportunities for all of our citizens. I remain proud that this country and its elected representatives continually attempt to apply the protection of our Constitution to all classes of citizens in our society. I remain saddened, however, that after so many years of discussing the problem of discrimination and attempting to eliminate it from our society, the problem still haunts us and the city of Phoenix is no exception.

The question now is do we need the Fair Housing Act of 1987, and my unequivocal response is yes. I know we need it from my own experiences as a Hispanic woman, from the experiences I have shared with my husband, who is Hispanic, and from my first-hand experiences of my high school child.

Critics may dismiss that and argue that I am overly sensitive. Those who know me know that is not the case. I am tougher than most and not easily dismissed, but I can assure you that overt and subtle forms of discrimination are a brutal assault on one's self-esteem and frequently the most subtle forms are the most difficult.

I know, however, that I was not invited to this hearing to share my own experiences. Millions of others could do that more eloquently and convincingly than I. I come before you today to share some empirical evidence that housing discrimination does exist in our society and that additional measures still need to be taken to combat this discrimination.

In the spring of 1986, the City of Phoenix Equal Opportunity Department conducted a housing audit of 146 apartment complexes spread throughout the city to determine if discriminatory practices were in evidence along racial or ethnic lines.

Auditors underwent a 3-day intensified training program in an effort to avoid subjective assessments. Following training, teams of auditors were dispatched to a cross-section of apartment complexes

throughout the city. A minority auditor, either black or Hispanic, visited the complex first and inquired about apartment availability, rental costs and about any rental inducements, such as waiving of security deposits, first month free rental or rental discounts. Within the hour, an Anglo auditor would follow. Care was taken to ensure that the Anglo auditor was similar in age, sex, occupation, marital status and other external characteristics.

The results of the audit, copies of which have been submitted to you and the members of your staff, leave no question that discrimination does exist.

We found three distinct types of discrimination:

First, availability. In 13 percent of the visits, apartment managers discouraged the minority auditors while encouraging Anglo auditors. Minorities were either offered later move-in dates, fewer choices in units, or told there were no vacancies when vacancies actually existed.

Second, rental costs. In 17 percent of the audits, black or Hispanic applicants were offered different amounts for rents, deposits, refunds or rental discounts than their Anglo counterparts. In the overwhelming number of these cases, minorities were asked to pay more.

Third, rental inducements. Measure after measure of marketing inducements clearly showed that black or brown skinned auditors were more likely to experience subtle but effective practices to discourage rental of a unit. In numerous cases, it was suggested to minority auditors that they might prefer accommodations elsewhere. This subtle form of discrimination is most disturbing and most difficult to confront. The repercussions on the minority community, however, are every bit as damaging as the overt forms of discrimination such as lies, higher prices, and restrictive agreements.

The city of Phoenix reaction to the study was one of shock and embarrassment. Our local newspaper with a moderately conservative philosophy editorialized:

> Deplorably, racism—and a tolerance for those who practice it—remains in our society. Whether subtly expressed or openly practiced, racially based discrimination—in housing, education, employment or social settings—deserves nothing less than total condemnation.
>
> Through the unified force of law, official and private pressure and concerted community outrage, the doors of tolerance should be abruptly and firmly closed to those found practicing racial discrimination. They are unwelcome and unwanted in Phoenix.

Clearly, our local press recognizes the need not only for individuals to reevaluate their attitudes and beliefs with regard to civil and human rights—but they also acknowledge the need for laws that offer these protections. The bill that you are in the process of debating would provide for such a law. Those who would cite it as another example of the long arm of the law interfering with personal business or interpersonal relationships, fail to understand that this is a very moderate approach to the civil rights protection.

Under the existing law, investigations of housing discrimination are meaningless in all but a few major class action cases and a small percentage of individual cases. The only remedy to an aggrieved individual is a costly legal battle—a remedy financially out

of reach to most minorities and too protracted to offer a timely resolution to the problem.

The Fair Housing Act of 1987 provides, first, for a timely conciliation process through HUD and if that is unsuccessful, a hearing before an administrative law judge. This same approach is used by 28 other Federal agencies and departments. Only in the most serious and extensive cases does the law provide for remedial solutions through our court system.

We, in Phoenix, are working along similar lines. Our Human Relations Commission is currently reviewing a proposed city ordinance which would provide administrative remedies similar to those provided in the Fair Housing Act of 1987. Unfortunately, that ordinance would apply only to Phoenix residents, leaving the rest of Arizona citizens without adequate protection. The existence of a Federal law would fill the gaps nationally, thus assuring that every individual has access to an appropriate remedy in cases of perceived discrimination.

I am also proud to say—and this is in response to your question, Senator DeConcini—that the city has formed a partnership in fair housing, bringing together representatives from HUD, city agencies, school districts, the Board of Realtors, the multi-housing association, banks, and home builders, in an attempt to address and resolve discriminatory practices. I am happy to report that all participants consider their involvement crucial to the future of our city.

In closing, Mr. Chairman and Senators, I urge your passage of this legislation. Leaving solutions solely to local authorities does not guarantee national adherence to our constitutional principles. Some may look at our Phoenix study and say discrimination exists less than 20 percent of the time.

Mr. Chairman, I submit to you that the subtle forms of discrimination run much higher than that and our study bears that out. In my opinion, the overt forms of discrimination through lies and inflated rental prices is alarmingly high.

I am a realist. Perhaps we cannot prevent a world in which there is no discrimination, but through our laws we can reduce the number of discriminatory instances. If the committees of Congress charged with protecting our constitutional rights cannot help us, then who else can we turn to.

I applaud your efforts and thank you for attempting to replace mistrust and suspicion with mutual respect.

If you would allow me, I would like to answer Senator DeConcini's question a little bit further, if that is possible.

Senator SIMON. You would like to do what?

Ms. WILCOX. Answer Senator DeConcini's question——

Senator DECONCINI. You cannot turn that down, Mr. Chairman.

Senator SIMON. We have been trying to ask him a question for a long time. [Laughter.]

We will let you try and do that.

Ms. WILCOX. Well, I am going to answer his question. He asked what Phoenix was doing, and I must tell you that we are very, very proud of the study because what it did was it joined forces together in Phoenix.

78-076 O - 88 - 9

The board of realtors, the housing community, the developers, the multi-family associations all worked at putting the survey together with us and they worked with us all the time the survey was being conducted, and when we announced it they were right by our side when it came before our council.

We have one of the vice presidents of the Phoenix Board of Realtors as chairman of our Fair Housing Committee. We formed a partnership. Realtors are helping us to assure that minorities are hired in the housing industry. We have had conferences. We asked them to assist us in setting up human relations workshops. We are doing this hand in hand with the housing industry. We believe that is the only way to solve the problem.

Senator DECONCINI. Thank you.

Thank you, Mr. Chairman.

Senator SIMON. Thank you. You got more than your 5 minutes in very tactfully there. [Laughter.]

Ms. Wilcox, you say in your statement, "I know we need the Fair Housing Act. My own experience as a Hispanic woman, from the experiences I have shared with my husband, who is Hispanic, and from the first-hand experiences of my high school child," and then you talk of subtle forms of discrimination. Do you mind relating whatever personal experiences you have had in housing discrimination?

Ms. WILCOX. Yes, I will. My husband is a State Representative from the State of Arizona. I am a city councilwoman. We have a lot of people come to us over and over who are having problems continually. We have had people come to us and have had us actually go talk to landlords, and my husband and I both have found that even our going and talking and showing that these people are credible, that was not the problem. The problem was they just did not want to rent to them.

About 10 years ago, we tried to have scattered housing sites put in the city of Phoenix. What happened at that time, I had just moved to an area of the town. We were the first Hispanic couple on the block. When we tried to put a scattered site approximately a block from my house, there is a big vacant lot, I went to a hearing and I overwhelmingly heard from that community who is predominantly Anglo, they did not want people, Hispanics or blacks coming into the neighborhood. They were afraid that once we put the scattered sites, then people would start buying into the neighborhood, and that was first-hand experience to me.

Senator SIMON. Thank you.

Mr. Hain, in your statement you have one phrase in here that I have not heard in testimony so far. You talk about people who hide their children. What happens, I assume, if I understand you correctly, is because there is discrimination against children they hide the children like they might hide contraband, in order to make sure they can live in places. Am I drawing the correct assumption.

Mr. HAIN. There are a number of scenarios, but roughly we are aware of many cases, investigation of other forms of discrimination, where women are essentially not reporting that they have children or the number of children that they have. The children are living on a part-time basis with the mother and sometimes the father, but are living elsewhere and in a very confused setting be-

cause they cannot be seen as full-time members of the families by the rental management.

Senator SIMON. I thank you.

Mr. Band, in your statement you talk about the rising number of incidents and what has been true in Cleveland has been true in other areas of the country. You talk about 77 incidents last year, compared with 50 reported in 1985 and 24 in 1984.

Incidentally, I have legislation introduced that would start keeping national tabs on racial crime statistics, S. 702, and I think Senator Metzenbaum may be working on similar legislation.

Why the increase in incidents?

Mr. BAND. I think the increase is attributable to at least two factors that I can think of. In the first place, I believe that there is a perception in this country that there will not be much strong enforcement of civil rights laws. I do not want to point fingers as to why that perception exists, but I think the perception does exist, because so many years have passed since the enactment of the civil rights legislation without any strong remedial action being taken on the part of authorities. And as a consequence of that, I believe that there is in this country a feeling that not much bad will happen to you if you violate the civil rights laws.

Second, I think that it is true that we have made some progress in integrating numbers of neighborhoods which were previously all white, and as we get into new neighborhoods, new pockets of resistance are uncovered; and, as I have said in my earlier statement, there are a great many people in this country who simply do not know that there are laws against discrimination in housing. As a consequence of that it comes to some of them as a surprise that these laws exist, and sometimes they respond to this surprise with violence.

What I was talking about in my statement is more than mere discrimination. Of course, discrimination on the ground of race in housing is not "mere." It leads to incidents of actual violence by people who are opposed to fair housing in this country.

Senator METZENBAUM. Mr. Band, you say that people have not gotten the message that housing discrimination laws will be enforced. What led you to that conclusion.

Mr. BAND. Well, let me just give you one example, which is in the printed statement that I submitted to the subcommittee, Senator Metzenbaum.

We had a case recently of a lawyer moving to Cleveland for the express purpose of enforcing the fair housing laws. He is a black man. He applied for an apartment from someone who happened to be white. He was told to his face that he simply would not be permitted because of the fact that he was black. He was even refused after he explained to the landlord what he did for a living. I think that is a legitimate example of the colossal ignorance that exists in this country, and I attribute that to the fact that there has been haphazard enforcement of the fair housing laws since 1968.

Senator Metzenbaum. Is stupidity a defense?

Mr. BAND. I doubt it. [Laughter.]

If it rises to the level of insanity, it might work, but I doubt it.

Senator METZENBAUM. Can you explain in a little more detail—I think you did in the opening statement—how housing segregation

leads to racial violence? I think you have touched upon that in your opening statement.

Mr. BAND. Well, let me just make reference to one incident in Cleveland which occurred this past summer when a neighborhood, which had previously been all white, was suddenly the home of a black family.

Great care was taken to make sure that the family was welcomed into the neighborhood. White support individuals, volunteers, were in the home; neighbors were contacted, the police were contacted, all sorts of efforts were made to create a kind of a tranquil transformation of that neighborhood to what it should have been, and that is an integrated community.

Nevertheless, a gang of ruffians emerged from various parts of that community threatening, hurling objects at the home, threatening to burn the home. Gunshots occurred. It was not too dissimilar, certainly in the perception of those who were in the home, to a situation that might be akin to a lynching in ancient days in another part of our country. And all of this took place in Cleveland, OH, one of the great cities of America in terms of an understanding of fair housing and of civil rights laws. And I say to you that those incidents are not isolated. They occur too many times, and for every one of those that occurs, there are a great many others without violence or with petty discrimination or with subtle discrimination, as Mrs. Wilcox has said, all of which are in violation of the fair housing laws.

Senator METZENBAUM [presiding]. I thank the panel very much for your cooperation and your testimony. You come from rather far distant points, but your support for the legislation is appreciated and I thank you very much.

If you have full statements that have not been included, that you have not made, your entire statements will be included in the record. Thanks very much.

Ms. WILCOX. Thank you, Senator.

[The following material was submitted for the record:]

TESTIMONY OF
COUNCILWOMAN MARY ROSE WILCOX
PHOENIX, ARIZONA
April 2, 1987

Mr. Chairman and distinguished Senators of the Subcommittee, I am honored to appear before you as a representative of the City of Phoenix to take part in this discussion of fair housing opportunities for all of our citizens. I remain proud that this country and its elected representatives continue in the attempt to apply the protection of our Constitution to all classes of persons in our society. I remain saddened, however, that after so many years of discussing the problem of discrimination and attempting to wipe it from our society, the problem still haunts us and the City of Phoenix is no exception.

The question asked is -- "Do we need the Fair Housing Act of 1987?" and my unequivocal response is "YES"! I know we need it from my own experiences as a Hispanic woman, from the experiences I have shared with my husband who is Hispanic and from the first-hand experiences of my high school child. Critics may dismiss that and argue that I am overly sensitive — those who know me, know that is not the case. I'm tougher than most and not easily dismissed but I can assure you that overt and subtle forms of discrimination are a brutal assault on one's self-esteem and frequently the most subtle forms are the most difficult.

I know, however, that I wasn't invited to this hearing to share my own experiences. Millions of others could do that more eloquently and convincingly than I. I come before you today to share some empirical evidence that housing discrimination does exist in our society and that additional measures still need to be taken to combat this discrimination.

In the Spring of 1986, the City of Phoenix Equal Opportunity Department conducted a housing audit of 146 apartment complexes spread throughout the City to determine if discriminatory practices were in evidence along racial or ethnic lines. Auditors underwent a three-day intensified training program in an effort to avoid subjective assessments. Following training, teams of auditors were dispatched to a cross section of apartment complexes throughout the City. A minority auditor, either Black or Hispanic, visited the complex first and inquired about apartment availability, rental costs and about any rental inducements, such as waiving of security deposits, first month free rental or rental discounts. Within the hour an Anglo auditor would follow. Care was taken to ensure that the Anglo auditor was similar in age, sex, occupation, marital status and other external characteristics.

The results of the audit, copies of which have been supplied to you and the members of your staff, leave no question that discrimination does exist.

We found three distinct types of discrimination:

1st -- Availability - In 13 percent of the visits, apartment managers discouraged the minority auditors while encouraging Anglo auditors. Minorities were either offered later move-in dates, fewer choices in units, or told there were no vacancies when vacancies actually existed

2nd -- Rental Costs - In 17 percent of the audits, Black or Hispanic applicants were offered different amounts for rents, deposits, refunds or rental discounts than their Anglo counterparts. In the overwhelming number of these cases, minorities were asked to pay more.

3rd -- Rental Inducements - Measure after measure of marketing inducements clearly showed that black or brown skinned auditors were more likely to experience subtle but effective practices to discourage rental of a unit. In numerous cases, it was suggested to minority auditors that they might prefer accommodations elsewhere. This subtle form of discrimination is most disturbing and most difficult to confront. The repercussions on the minority community, however, are every bit as damaging as the overt forms of discrimination such as lies, higher prices, and restrictive agreements.

The City of Phoenix reaction to the study was one of shock and embarrassment.

Our local newspaper with a moderately conservative philosophy editorialized:

> "Deplorably, racism -- and a tolerance for those who practice it -- remains in our society. Whether subtly expressed or openly practiced, racially based discrimination -- in housing, education, employment or social settings -- deserves nothing less than [illegible]al condemnation.
>
> Through the unified force of law, official and private pressure and concerted community outrage, the doors of tolerance should be abruptly and firmly closed to those found practicing racial discrimination. They are unwelcome and unwanted in Phoenix.

Clearly, our local press recognizes the need not only for individuals to re-evaluate their attitudes and beliefs with regard to civil and human rights -- but they also acknowledge the need for laws that offer these protections. The bill that you are in the process of debating would provide for such a law. Those who would cite it as another example of the long arm of the law interfering with personal business or interpersonal relationships, fail to understand that this is a very moderate approach to the civil rights protection.

Under the existing law, investigations of housing discrimination are meaningless in all but a few major class action cases and a small percentage of individual cases. The only remedy to an aggrieved individual is a costly legal battle -- a remedy financially out of reach to most minorities and too protracted to offer a timely resolution to the problem.

The Fair Housing Act of 1987 provides, first, for a timely conciliation process through HUD and if that is unsuccessful, a hearing before an administrative law judge. This same approach is used by 28 other federal agencies and departments. Only in the most serious and extensive cases does the law provide for remedial solutions through our court system.

We, in Phoenix, are working along similar lines. Our Human Relations Commission is currently reviewing a proposed City ordinance which would provide administrative remedies similar to those provided in the Fair Housing Act of 1987. Unfortunately, that ordinance would apply only to Phoenix residents, leaving the rest of Arizona citizens without adequate protection. The existance of a federal law would fill the gaps nationally, thus assuring that every individual has access to an appropriate remedy in cases of perceived discrimination.

I am also proud to say that the City has formed a partnership in fair housing, bringing together representatives from HUD, City agencies, school districts, the Board of Realtors, the multi-housing association, banks and home builders in an attempt to address and resolve discriminatory practices. I am happy to report that all participants consider their involvement crucial to the future of our City.

In closing, Mr. Chairman and Senators, I urge your passage of this legislation. Leaving solutions solely to local authority does not guarantee national adherence to our constitutional principles. Some may look at our Phoenix study and say -- "Discrimination exists less than 20 percent of the time." Mr. Chairman, I submit to you that the subtle forms of discrimination run much higher than that and our study bears that out. In my opinion, the overt forms of discrimination through lies and inflated rental prices <u>is</u> alarmingly high.

I'm a realist, perhaps we cannot prevent a world in which there is no discrimination, but through our laws we can reduce the number of discriminatory instances. If the committees of Congress charged with protecting our constitutional rights can't help us, then who else can we turn to?

I applaud your efforts and thank you for attempting to replace mistrust and suspicion with mutual self-respect.

KNOCK OUT HOUSING DISCRIMINATION

WHAT IS FAIR HOUSING?

Fair Housing is the right for all people to have safe, decent housing and be able to get this housing without discrimination. City and federal Fair Housing laws require that all people have an equal opportunity to buy, rent, or live in housing.

Fair Housing laws prohibit discrimination based on:

- race
- color
- religion
- sex
- national origin

HOW CAN I RECOGNIZE HOUSING DISCRIMINATION?

- REFUSAL TO DEAL — Refuse to sell, rent, lease, exchange or negotiate for a dwelling.
- DIFFERENT TERMS/CONDITIONS — Discriminate in the terms or conditions of sale or rental of a dwelling.
- MISREPRESENTATION — Represent that an available dwelling is not available for inspection, sale or rental.
- DISCRIMINATORY PRESENTATION — Say, publish or display a racial, religious, sexual or ethnic preference with respect to the sale or rental of housing.
- STEERING — Engage in directing anyone to homes or rental property in a particular area based on discriminatory reasons.
- UNEQUAL FINANCING — Deny a loan to anyone or discriminate in the terms and conditions of a loan.
- BLOCKBUSTING — Engage in panic-selling by representing that the racial composition of a neighborhood is going to change.

If you have experienced any of the above, chances are you have been a victim of discrimination.

WHAT HOUSING IS COVERED?

Apartments rented or leased by owner, manager or a company — Houses sold or rented by real estate company or broker — Houses sold or rented directly by an individual owner — Boarding and rooming houses.

WHO IS RESPONSIBLE UNDER THE LAWS?

Advertising Media
Apartment Housing Agents & Managers
Banks
Condominium Developers and Owners
Contractors
Developers
Governmental Housing Programs
Home Builders
Individual Homeowners
Landlords
Landowners
Mortgage Lenders and other Financial Institutions
Rental Agents
Real Estate Brokers
Real Estate Salespersons
Savings & Loan Associations

WHAT IF I BELIEVE I AM DISCRIMINATED AGAINST?

- You may file a formal complaint with the Investigations Section of the Equal Opportunity Department. Housing complaints filed under the City Ordinance are also filed under the Federal Fair Housing Act.

WHAT HAPPENS NEXT?

- The Equal Opportunity Department conducts a full, fair and impartial investigation of the complaint which includes talking to the landlord, owner, real estate or financial industry people as well as the complainant.
- If the investigation reveals no unlawful practice, both parties are informed, and the case is closed.
- If a violation of the Fair Housing laws is found, the department attempts to resolve this issue by conciliation.
- If conciliation is successful and the terms of the agreement are lived up to, the case is closed.
- If conciliation is unsuccessful or if the terms of the agreement are violated, legal actions may be taken if necessary to enforce the laws.

WHERE DO I CALL WITH A QUESTION OR A COMPLAINT?

Housing Discrimination

- Complaint filing
- Fair Housing laws
- Investigations
- Training

Investigations Section
City of Phoenix
Equal Opportunity Department
251 West Washington
3rd Floor
Phoenix, AZ 85003
262-7486

Fair Housing Program

- Community Involvement
- Education
- Research
- Speaker's Bureau

Community Services Section
City of Phoenix
Equal Opportunity Department
251 West Washington
3rd Floor
Phoenix, AZ 85003
261-8242

Fair Housing Counseling and Referral

- Available low-cost housing for rent or sale
- Locating housing
- Resolving housing problems
- Rights and responsibilities of home ownership
- Training in fair housing practices

Fair Housing and Counseling Division
City of Phoenix
Urban Development and Housing Department
830 East Jefferson
Phoenix, AZ 85034
262-6952

HOW IS THE COMMUNITY INVOLVED?

The Phoenix Human Relations Commission is composed of community-minded citizens appointed by the Mayor with the approval of the City Council. Their responsibility is to support and promote fair housing within the city. The Equal Opportunity Department provides staff assistance to the Phoenix Human Relations Commission.

The Housing Commission is a citizen advisory board appointed by the Mayor with the approval of the City Council. The Commission's responsibilities are to identify housing problems, clarify the role of the public and private sectors and make recommendations for city action. The Urban Development and Housing Department provides staff assistance to the Housing Commission.

Phoenix is an equal opportunity employer.

City of Phoenix
Equal Opportunity Department
251 West Washington, 3rd Floor
Phoenix, Arizona 85003
(602) 262-7486

KNOCK OUT DISCRIMINACIÓN EN VIVIENDA

¿QUE ES HABITACIONES JUSTAS?

Habitaciones justas es el derecho de todas las personas de tener habitaciones seguras y decentes y obtenerlas sin ser discriminadas. Leyes federales y de la ciudad tocante habitaciones, requiere que cualquier persona tiene la oportunidad equitativa en escoger habitaciones ya sea para compra o arriendo.

Leyes de habitaciones justas prohibe discriminación en vivienidad tocante:

- raza
- color
- religion
- sexo
- origen nacional

¿COMO RECONOCER LA DISCRIMINACIÓN EN HABITACIONES?

- NEGAR TRATO — Negar la venta, arriendo, arrendamiento, cambio o negociar para una habitación.
- CONDICIONES DISTINTAS — Discriminar en las condiciones de la venta o arriendo de una habitación.
- FALSA REPRESENTACION — Representar que una habitación disponible, no esta disponible para la inspección, venta o arriendo cuando si lo esta.
- PRESENTACION DISCRIMINATORIA — Informar, publicar o declarar pre'ferencia racial, religiosa, sexual o étnica con respecto a la venta o arriendo de vivienda.
- ENGANO — Participar en el engaño de cualquier persona en la venta o arriendo de vivienda por razones discriminatorias.
- FINANCIACION DESIGUAL — Negar un préstamo a cualquier persona o descriminar en las condiciones del prestamo.
- BLOCKBUSTING — Participar en ventas apresuradas por el motivo que la composición racial de un barrio va a cambiar.
- SI USTED HA SUFRIDO ALGO DE LO ANTERIOR, ES POSIBLE QUE USTED HA SIDO DISCRIMINADO.

¿CUALES HABITACIONES AFECTA?

Apartamentos arrendados por el dueño, gerente o un compañia. — Casas vendidas o arrendadas por un inmobiliario o corredor. — Casas vendidas o arrendadas directamente por un dueño particular. — Casa de huespedes o casa donde se alquila cuartos.

¿QUIEN ES RESPONSABLE BAJO LA LEY?

Medios de Publicidad
Gerentes de Apartamentos
Bancos
Duenos y Formentadores de Condominios
Programas de Vivienda del Gobierno
Constructor de Casas
Clientes Particulares
Duenos de Casas Particulares
Duenos
Agentes de Arriendo
Corredor Inmobiliario
Vendedores de Inmobiliario
Asociación de Prestamo y Ahorros
Residentes
Vendor Hipotecario

¿QUE PUEDO HACER SI CREE QUE HA SUFRIDO DISCRIMINACIÓN?

Ud. puede solicitar una queja formal con el sección investigatoria del Departamento de Oportunidad Igual, al tel. 262-7486. Quejas de habitaciones que son solicitados bajo de la Ordenanza de la Ciudad tambien seran solicitadas bajo de el acto federal de habitaciones.

¿QUE SUCEDE DESPUES?

- El Departamento de Oportunidad Igual conducirá una investigación completa, justa e imparcial de la queja que incluye entrevistas con el dueño, Agencia de Bienes Raices y tambien con el demandante.
- Si la investigacion revela que no existe praticas ilegales, sera informados ambos lados y el caso es cerrado.
- Si se encuentra una violacion contra la ley el Departamento se trata de resolver por medio de conciliación.
- Si resulta existosa la conciliación y las condiciones se cumplen, el caso es cerrado.
- Si la conciliacion y las condiciones del acuerdo son violadas sera necesario obtener accion legal para enforzar la ley.

¿A DONDE LLAMO CON UNA PREGUNTA O QUEJA?

Discriminacion En Habitaciones

- Solicitud de Queja
- Leyes de Habitaciones Justas
- Investigaciones
- Entrenamiento

Ponerse en contacto con:
Investigaciones
Departamento de Oportunidad Igual
Ciudad de Phoenix
251 W. Washington
Tercer Piso
Phoenix, AZ 85003
(602) 262-7486

Programas de Habitaciones Justas

- Proyectos de la Comunidad
- Educación
- Estudias

Ponerse en contacto con:
Servicios del Comunidad
Departamento de Oportunidad Igual
Ciudad de Phoenix
251 W. Washington
Tercer Piso
Phoenix, AZ 85003
(602) 261-8242

Consejo de Habitaciones Justas y Referencias

- Habitaciones economicas disponibles por venta o arrendo
- Remedios para problemas de habitaciones
- Derechos y responsibilidades por dueños de habitaciones
- Entrenamiento en praticas de habitaciones justas

Habitaciones Justas y el Division Consejero
Ciudad de Phoenix
Desarrollo Urbano y Departamento de Habitaciones
830 E. Jefferson
Phoenix, AZ 85034
(602) 262-6952

¿COMO ESTA COMPROMETIDA LA COMUNIDAD?

La Comision de Relaciones Humanas de Phoenix esta formada por ciudadanos orientados hacia la comunidad, nombrados por el alcalde, con la aprobación del ayuntamiento. Su responsibilidad es el sustento y formiento de habitaciones justas en la ciudad. El Departamento de Oportunidad Igual proporciona asistencia a la Comision de Relaciones Humanos de Phoenix.

La Comision de Habitaciones es una junta consultivo nombrado por el alcalde con la aprobación del ayuntamiento. Las responsibilidades del Comisión sera la identificación de problemas de habitaciones, clarificar las responsibilidades de el sector popular y privado y hacer recomendaciones a la ciudad. El Departamento de Habitaciones y Desarollo Urbano proporciona asistencia a la Comision de Habitaciones.

La ciudad de Phoenix es un empleador equitativo.

Ciudad de Phoenix
Departamento de Oportunidad Igual
251 W. Washington
Tercer Piso
Phoenix, AZ 85003
(602) 262-7486

ABSTRACT

HOUSING DISCRIMINATION IN PHOENIX: 1986

The Equal Opportunity Department of the City of Phoenix conducted a housing audit in the Spring of 1986 to survey the Phoenix rental multihousing market for racial and ethnic discriminatory practices. The study was one component of a $75,000 Fair Housing grant from the U.S. Department of Housing and Urban Development under its Fair Housing Assistance Program. The purpose of the grant was to define local discrimination problems and to work with both the private and public sectors to improve Fair Housing conditions in Phoenix.

The study documented that housing discrimination clearly does occur in the Phoenix rental housing market. Most acts of differential treatment were subtle and detectable only through comparison of treatment received by different auditors at the same apartment complex.

In the study 146 valid audits of apartment complexes were completed in which trained teams composed of Black, Hispanic and Anglo auditors individually made on-site visits to apartment complexes to inquire about the availability and rental terms of units. A roughly equal number of small, medium and large complexes were audited in each of the eight City Council districts.

To ascertain the nature and kind of discriminatory behaviors operating in the Phoenix rental market, the following three variables were audited: availability, rental costs, and rental inducements.

Availability discrimination ranged from total denial of the opportunity to rent to a distinct preference primarily for Anglos who were offered earlier availability dates and a greater choice of available rental units. In 13% of the audits, one auditor was either informed nothing was available or was given a later date for availability as compared to a team member.

This preferential treatment was unequivocally demonstrated in the financial data in which nine out of thirteen apartment complexes offered rental discounts on a discriminatory basis. Additional cases of difference in financial treatment along racial and ethnic lines occurred in the amount of rent, deposit, and deposit refund but not at a statistic significant level.

A significant pattern of attitudinal discrimination also emerged from the data in which rental agents put significantly less effort into "selling" a rental complex to minorities than they did to Anglos. While such treatment does not deny an opportunity to rent, it can impact on the desirability of living at a particular complex or even a part of town.

In summation, housing discrimination is practiced by a minority of the Phoenix rental agents on a subtle but significant level. The subtle nature of these acts makes it difficult for persons to detect that they have experienced discriminatory treatment. More pervasive and widespread is the attitudinal discrimination in which less effort is made to induce minorities to rent. This practice can effectively continue to encourage segregated living patterns in the City of Phoenix.

HOUSING DISCRIMINATION IN PHOENIX: 1986

I. HYPOTHESIS:

This project is designed to test the hypothesis that discrimination based on race and national origin is a problem in the Phoenix multihousing rental market. This is to be tested by surveying rental practices through on-site visits by Anglo, Black and Hispanic auditors. The following variables were used to measure differential treatment in the survey:

1. unavailability/availability comparision and different waiting periods for available units;

2. differences in rental inducements by apartment agents, and

3. different costs as to rent, deposit, refund and discount.

II. RESEARCH DESIGN:

SAMPLE SELECTION: In order to test our hypothesis, 150 apartment complexes were selected for auditing of rental practice. The complex sizes were roughly equal in distribution between small (4 to 50 units), medium (51 to 100 units) and large (over 100 units). The number of complexes tested were also fairly even in their distribution within each of the eight City Council districts. This was done to obtain a City-wide "snapshot" of the nature, kind and location of possible discriminatory activities.

The prime criterion for sample selection was that at least one unit had to be available at a tested complex. The first mode of sample selection was to use classified advertisements in newspaper and special apartment hunting magazines as sources of available units. This method did not prove satisfactory because: (1) complexes with more than 100 units were the main advertisers; (2) frequently, advertised vacancies filled prior to a scheduled audit date; and (3) vacancy signs hung in front of complexes seemed to be the most common form of advertising used by a majority of complexes.

The next method tried was to randomly select census tracts within each district and to visually scout for all complexes representing all three categories of sizes.

This method worked well except in Districts 2, 4, and 7 because in these districts, certain size categories were not well represented. Therefore, a researcher had to drive these districts, street by street, to find sufficient complexes with vacancies in the under-represented sizes.

The chart entitled Sample Distribution (see Appendix A) describes the sample distribution by Council district, school attendance zones and complex size.

AUDIT TEAM: Teams of two or three auditors (Black/Anglo, Hispanic/Anglo, and Black/Hispanic/Anglo) inquired about the availability and terms and conditions of rental at 150 apartment complexes. Four of the audits were discarded for technical reasons.

Twenty Black, Hispanic and Anglo auditors underwent an extensive three day, 16 hour training program prior to conducting audits. Also, all auditors were debriefed after each audit to assure accuracy in reporting data.

Black/Anglo teams made inquiries at a total of 47 apartment complexes. Hispanic/Anglo teams visited 77 complexes. Black/Anglo/Hispanic teams audited 22 complexes. Following standard statistical rules, data from each of the three kinds of teams were analyzed as separate studies. In each of the three sets of analyses, the data was examined for statistically significant evidence of discrimination. Due to insufficient sample sizes, analyses were not carried out by size of complex, City Council district or school district. The auditor teams were matched closely for age, sex, occupation, marital status and other characteristics so that race and/or national origin were to be the distinguishing characteristics.

The normal sequence for conducting an audit was to have the minority auditor(s) arrive on-site separately to do an availability test. After the minority(s) left, the Anglo auditor would visit the complex to carry out the same test. If any questions remained whether or not the unit was still available, the debriefer or auditor would check by telephone.

Each auditor was given normally only two profiles which were matched as much as possible to his/her own personal characteristics. These profiles were used consistently throughout the survey. Originally, auditors had been given profiles as parents with child/children. Several cases occurred in which all team members experienced the same discrimination in refusal to rent because of "their" children. Because this obscured any distinction in treatment based on race or national origin, this profile was completely dropped, and another one substituted in its place.

VARIABLES: Three types of variables were used in this study. The first measures availability; the second measures rental inducement by the agent, and the third measures rental costs.

Three different tests of availability were conducted during this survey. A first test was to compare differences as to the date of availability (immediately, within a month, after a month, not sure, and unavailable). The second test focused on comparing availability with unavailability. An example of this measure would be if one auditor was informed that no units were available while another auditor was told a unit would be available in two weeks. The last variable measures the number of units available for rent as told to the auditor. This was considered a measure of availability as choice of location, size, and condition of unit can impact on the desirability of renting a unit.

The second set of variables dealt with rental inducement effort. This can also be defined as attitudinal discrimination in which the rental agent makes a difference in effort to sell the desirability of renting at that site. This set of variables includes the average number of good points about the apartments, the average number of good points about the community, and the number of units the auditor was invited to inspect.

The last set of variables dealt with disparate treatment regarding rent, deposit, refund, and rental discount. The rents are monthly figures; deposit refers to the cleaning and security deposits. Refund is the dollar amount to be returned to the tenant if the unit is left clean and undamaged at the time of moving out. In Arizona, landlords are legally allowed to charge a non-refundable cleaning deposit. The last category, rental discount, is offered to potential tenants as an inducement to sign a lease.

III. FINDINGS:

The findings are discussed in the three sections: availability, rental inducement and rental costs.

A. Availability

The first test of availability combined all differential availability data in which one auditor was either informed nothing was available or else given a later date for an available unit as compared to a team member. The five categories used to classify this data are: Immediately Available, Within A Month, After A Month, Not Sure, and Nothing Available.

There were nineteen cases (13% of the total number of valid audits) in which preferential treatment was given regarding the date of availability as compared to another audit team member. Five (26% of these nineteen cases) occurred in small complexes (5-50 units); five (26%) in medium complexes (51-100 units), and nine (48%) in large complexes (over 100 units). Please refer to Appendix B for the Comparable Availability Chart which details the results.

As the total number audited of each complex size was roughly equal (refer to Appendix A), these figures indicated that discrimination by large complexes may be having a greater impact on the rental market for two reasons. First, they have a larger number of available units on the market at any one time, and secondly, they tend to commit more acts of discrimination, thus impacting more people adversely.

The next test of availability focused solely on whether or not a unit was totally unavailable to at least one member of an audit team. Of the nineteen cases cited above, there were seven (37%) in which one auditor was told a unit was not available while other auditors were told that it was. In all cases, at least one of the minority auditors was denied availability (re. Appendix C). Further examination revealed that in these seven audits, five complexes were less than 51 units, and the other two were larger than 100 units.

This particular result was especially interesting because it confirmed the Department's belief that this type of discrimination would occur mainly in the small complexes which used part-time, untrained managers. Of the seven audits, three occurrences were against Blacks, four against Hispanics and one against the Anglo. This includes one case in which the Black and the Anglo both received adverse treatment compared to the Hispanic. (There were approximately 1/2 more Hispanic tests than Black tests in the survey to reflect the significantly larger Hispanic

population in Phoenix.) Although these results did not prove to be statistically significant using the Wilcoxon Pairs Signed Ranks Test and the Cochran Q Test, they do reveal that illegal acts of total denial of the opportunity to rent continues to occur to minorities in the Phoenix rental market particularly in small complexes.

The last measure of availability was the difference in the number of units available for rent as told to each auditor. The results showed this measure of different treatment to be statistically significant for Hispanic/Anglo and Black/Hispanic/Anglo teams. The statistical tests applied to this data are the Wilcoxon and the Friedman Analysis of Variance. The chart below gives this information.

TEAM	TEST	SIGNIFICANCE
Black/Anglo	Wilcoxon	(.304) NO
Hispanic/Anglo	Wilcoxon	(.003) YES
Black/Hispanic/Anglo	Friedman	(.020) YES

Of a total of 36 cases, nearly half of these cases (17) occurred at large complexes. Eleven occurred in small and eight in medium sized complexes. Appendix D charts the number of available units by complex, race and national origin.

In summation, incidences of discrimination clearly occur in the Phoenix rental market. The kinds of discrimination range from a total denial of an opportunity to rent to a more subtle preference shown primarily to Anglos as to availability dates and rental unit options.

The fact that these incidents do not occur at a statistically significant level may demonstrate the results of more than twenty years of public educational efforts with the resulting change in social values from a prior period when racial and ethnic covenants were a common occurrence in the Phoenix metropolitan area. It also may indicate that the continuation of discriminatory acts may occur at a more subtle level -- the application process itself in which minorities are screened out for pretextual reasons. This type of discrimination was not audited in this study.

b. Rental Inducement

The various tests of this variable revealed that in six out of nine tests, statistically significant differences based on race and/or national origin occurred. In all these cases Blacks were treated less favorable than the other groups. The following shows the results.

Variable	TREATMENT TEST Black	Hispanic	Anglo	Significance
1. Average number of good points about apartment	3.11		5.34	YES (.001)
		6.04	5.14	YES (.008)
	3.27	4.27	4.55	NO (.064)
2. Average number of good points about community	2.43		3.43	YES (.009)
		4.49	2.83	YES (.001)
	1.73	3.91	2.60	YES (.043)
3. Number of units invited to inspect	Black/Anglo			YES (.048)-favors Anglo
	Hispanic/Anglo			NO (.163)
	Black/Hispanic/Anglo			NO (.703)

Additional measures of rental inducement are the financial variables, especially the rental discount. These are discussed in a separate section following this one.

Again, as shown in the availability tests, a significant pattern of attitudinal discrimination exists within the multihousing industry in Phoenix by which rental agents put significantly less effort into "selling" a rental complex to minorities than they do to Anglos. This can result in perception by potential minority tenants that they are not welcome or desired as tenants and may increase the forces of self-segregation. In fact, minority auditors, returning from these incidences with non-enthusiastic/non-informative agents, often commented that they would not want to rent there. This is a subtle but significant form of discrimination.

C. Rental Costs

Disparate treatment took place in 25 cases (17%) in regards to rent, deposit, refund, and rental discount. There were five cases of rental differences, five of deposit differences, five of refund differences and sixteen (two-thirds) of rental inducement differences. Ten of these sixteen rental inducement cases occurred in large complexes. In some cases, more than one type of differential treatment occurred (Re: Appendix E).

Rental cost incidences occurred nearly half the time at large and small complexes both (10 incidences each). Five occurred at medium size complexes.

The Anglo auditors received the favorable treatment in all but three cases. In those three cases, the Black auditor received favorable treatment; the Hispanic auditors never received preferential treatment.

In three cases the Anglo received the financial advantage on two different financial measures; in one case, the preferential treatment was offered the Anglo on three measures (rent, deposit and refund). Appendix E depicts the favored race or national origin and the amount of variance for each of the four variables for all cases of disparate treatment.

The disparate treatment of Blacks regarding rental discounts proved to be statistically significant (Appendix F). This amounts to 11% of all audits showing differential treatment just on this one factor alone. The dollar amount involved totaled $2,135.00. Only one of these cases favored the Black auditor; the other eight gave preferential treatment to the Anglos.

In conclusion, the financial variable which occurred most frequently was the rental inducement factor. Again, large complexes are associated much more frequently with this measure than the other sizes. As small complexes often cannot afford rental discounts, they resorted to other financial variables to discourage potential minority tenants.

D. Auditor Reactions

As revealing as the statistics are, the picture of the Phoenix rental housing market would not be complete without adding data taken from the comments recorded by the auditors themselves. Below is a sampling of their own experiences:

1. An Anglo auditor said the manager kept referring to Blacks as they/them. He was blatantly informed by the manager that a Black auditor's references would be very carefully checked.

2. A Black auditor was the only one informed that no loud parties, TV, or drinking was allowed, and he was steered to a complex across the street that allows these things.

3. A manager told an Anglo auditor that the back apartments were called "Ghetto City".

4. An Anglo manager gave an Anglo auditor an application; this same manager told a Black auditor that she wasn't the manager and thus couldn't give him an application.

5. Minorities were shown less desirable apartments than Anglos.

6. A Black auditor was the only one asked if he was on the federal Section 8 housing assistance program.

7. The cool treatment by managers at several different complexes resulted in minority auditors writing that they wouldn't live at these places.

IV. CONCLUSIONS

1. The hypotheses was supported in that housing discrimination clearly does occur in the rental housing market in Phoenix.

2. The majority of acts of disparate treatment were subtle and were detectable only through comparison of treatment of minority and Anglo auditors. The size of the complex did not seem to be a factor in whether or not differential treatment occurred. However, certain kinds of differential treatment may occur more frequently in one size of complex than another size (ex.: total unavailability in small complexes and rental discounts at larger complexes).

3. Blacks received the least favorable treatment from apartment rental agents.

4. Statistically significant discrimination occurred as a rental market pattern in regards to a variety of rental inducement efforts made by agents to potential minority tenants. Such behavior can have the effect of making these people feel unwelcome and unwanted and thus reinforcing the forces of self-segregation. When it involves financial inducements, such as rental discounts, it can help assure that the vacancies are filled with Anglo tenants.

5. In one-third of the availability cases, minority auditors were discriminated against by being told a unit was unavailable when it actually was available. These acts occurred mainly in small complexes.

6. Differences in the date of availability occurred in 13% of the cases. This factor can be just as significant as non-availability in depriving an auditor of an opportunity to rent.

7. Attitudinally different treatment, well documented in this study, may signal discrimination in application screening, the next step in the rental process.

8. The disparate treatment documented in this survey indicates that fair housing laws may have been violated. These laws are designed to protect the rights of <u>all</u> people regardless of race, color, sex, religion or national origin.

9. This survey was conducted as an educational study. It was intended to give the City of Phoenix a snapshot as to the nature and kind of discriminatory factors operating in the Phoenix rental market.

APPENDIX A

SAMPLE DISTRIBUTION

Council District		School District		Complex Size	
District No.	No. Audited	District No.	No. Audited	Units	No. Audited
1	20	1	1	0-50	52
2	15	11	14	51-100	43
3	20	21	7	over 100	51
4	19	22	2		
5	18	24	4		
6	19	31	1		
7	15	32	6		
8	20	33	13		
		34	6		
		41	20		
		42	5		
		51	14		
		61	17		
		71	11		
		81	2		
		82	21		
		23	2		

APPENDIX B

COMPARABLE AVAILABILITY

City Council District	Complex Size	Immediately Available	Within Month	After Month	Not Sure	Nothing Available
1	Small		A			H
1	Medium	A	B			
1	Large	A, H	B			
2	Large		A, H			B
3	Small		A			B
3	Large	A				H
4	Small		A			H
4	Medium	H	A			
5	Medium	H			A	
5	Large	A	B			B, A
6	Small		H			
6	Large		A	H		
7	Medium	A, B	H			
7	Large		A		B	
8	Large	H	A, B			
8	Medium	A	H			
8	Large	A	B			
8	Large	B, H	A			
8	Small			A		H

Complex Size	
# of Units	Classification
5 - 50	Small
51 - 100	Medium
100 +	Large

Race/National Origin Code

A = Anglo
B = Black
H = Hispanic

6203x

APPENDIX C

AVAILABILITY/UNAVAILABILITY

City Council District	Complex Size	Available	Unavailable
1	Small	Anglo	Hispanic
2	Large	Anglo, Hispanic	Black
3	Small	Anglo	Black
3	Large	Anglo	Hispanic
4	Small	Anglo	Hispanic
6	Small	Hispanic	Black, Anglo
8	Small	Anglo	Hispanic

6203x

APPENDIX D

COMPARABLE NUMBER OF UNITS AVAILABLE FOR RENT

City Council District	Complex Size	Number Available for Rent						
		0	1	2	3	4	5	6
1	Small		H			A		
1	Medium					B	A	
1	Small	H		A				
1	Small		H	B, A				
1	Large		A			H		
1	Small		H	A				
1	Medium	H			A			
1	Large		H		A			
1	Large					H	A, B	
1	Medium		A		B			
1	Small		H				A	
1	Large		A	H, B				
2	Small		B	A				
2	Large			B			A	
2	Small		H	A				
2	Small		A			H		
2	Medium		A			H		
2	Small		B	A				
2	Large			B, H	A			
2	Large	B	H	A				
3	Medium	B	H	A				
3	Medium		B, H	A				
3	Large		H, A	B				
4	Medium	B, H					A	
4	Large			B, A	H			
5	Small		B		H	A		
5	Medium		H	B	A			
5	Small		H	B, A				
5	Large		B, A	H				
6	Large		B	H	A			
6	Large	H	B	A				
7	Large			H		A	B	
7	Large			H	B, A			
7	Large		H	B			A	
8	Large				H	B, A		
8	Large		H, A	B				

A = Anglo
B = Black
H = Hispanic

6203x

APPENDIX E

FINANCIAL DISPARATE TREATMENT

Black/Anglo

City Council District	Complex Size	Rent	Deposit	Refund	Rental Discount
2	Small		B - Deposit in 2 installments		
2	Large		A - $50		A - $160
2	Large				A - $50
2	Small	A - $30			
2	Large				A - $50
5	Large		A - Deposit in 3 installments		A - Free cable & phone installation
5	Large				A - $100 B - $50
5	Small				A - $100 B - $200
6	Large				A - $625 B - $200
6	Medium			A-$100	
6	Large				B - $100
7	Small	A - $40			A - $50
8	Small	A - $15		B-$40	

Hispanic/Anglo

Council District	Complex Size	Rent	Deposit	Refund	Rental Discount
2	Small				A - $100
2	Medium		A - $180		
4	Medium			A-$25	
5	Small				A - $50
7	Large				A - $100
8	Small	A - $30			
8	Medium				A - $100

Black/Hispanic/Anglo

Council District	Complex Size	Rent	Deposit	Refund	Rental Discount
4	Medium				A - $295
5	Medium	A - $100	A - $50	A-$50	
5	Small			B-$100	
6	Large				A - $200
7	Large				A - $100

6203x

APPENDIX F

Variable	Black	Hispanic	Anglo	No. of Cases	Statistical Significance
Rent	$ 0		$ 85	3	No
		0	30	1	No
	0	0	100	1	No
Deposit	$ 0		$ 50	1	No
		0	180	2	No
	0	0	50	1	No
Refund	$ 40		$ 100	2	No
		0	25	1	No
	100		50	2	No
Discount	$100		$ 990	9	Yes (1.84)*
		0	350	4	No
	0	0	595	3	No
	$240	0	$2,605	30	

Black/Anglo Team = 46 total audits
Hispanic/Anglo Team = 77 total audits
Black/Hispanic/Anglo = 22 total audits

*Statistical test used was a T-Test of Matched Pairs (one tailed) at 5% level of significance.

6203x

Senator METZENBAUM. The next panel is Tom Holmes, president, National Association of Real Estate Brokers; Jacqueline Simon, Mimi Selig Homes, Inc., Montgomery County, MD; Fletcher R. Hall, executive vice president, Greater Baltimore Board of Realtors; Randall Raynolds, president-elect, Illinois Association of Realtors; and Alvin Pearson, president, Greater South Suburban Board of Realtors, Chicago area.

We will hear first from Fletcher Hall, executive vice president, Greater Baltimore Board of Realtors.

A PANEL CONSISTING OF FLETCHER R. HALL, EXECUTIVE VICE PRESIDENT, GREATER BALTIMORE BOARD OF REALTORS; RANDALL RAYNOLDS, PRESIDENT-ELECT, ILLINOIS ASSOCIATION OF REALTORS; ALVIN PEARSON, PRESIDENT, GREATER SOUTH SUBURBAN BOARD OF REALTORS, CHICAGO, IL; JACQUELINE SIMON, REALTOR, MIMI SELIG HOMES, INC., ROCKVILLE, MD; AND T.L. HOLMES, PRESIDENT, NATIONAL ASSOCIATION OF REAL ESTATE BROKERS

Mr. HALL. Thank you, Senator Metzenbaum.

I am Fletcher R. Hall, executive vice president of the Greater Baltimore Board of Realtors, in Baltimore, MD. I am accompanied today by our board president-elect, Mr. Arthur E. Davis III.

The Greater Baltimore Board of Realtors is America's oldest organized real estate board, founded in 1858. We represent some 375 real estate firms in residential and commercial real estate and have some 5,000 individual realtor members.

The Greater Baltimore Board of Realtors is proud of its nationally recognized leadership role in encouraging and promotiong fair housing, as evidenced by the first Fair Housing Practices Award presented to the Greater Baltimore Board of Realtors by Baltimore Neighborhoods, Inc., in 1965. The Greater Baltimore Board of Realtors was the recipient of the HUD Fair Housing Achievement Award in the public-private partnership category in 1985.

The Greater Baltimore Board of Realtors is one of the few real estate boards in the Nation which requires continuing education training in equal housing opportunities in order for a realtor to maintain membership in the board.

The Greater Baltimore Board of Realtors has vigorously and constantly encouraged its members to comply with equal opportunity laws and guidelines and, in fact, has one of the highest compliance rates among board of realtors in the Nation, according to the findings of the 1986 Voluntary Affirmative Marketing Agreement review conducted by the Baltimore regional HUD office.

The Greater Baltimore Board of Realtors was the first real estate board in the Nation to sign the Voluntary Affirmative Marketing Agreement between HUD and the National Association of Realtors in 1976.

Member firms of the Greater Baltimore Board of Realtors are complying with all the civil rights laws and the Voluntary Affirmative Marketing Agreement provisions and guidelines.

This year, the Greater Baltimore Board of Realtors is engaging in a number of other activities to encourage not only compliance with advertising guidelines, but to educate and remind all of our

members of the components contained in the Voluntary Affirmative Marketing Agreement, and local and State and Federal regulations and laws.

Additionally, the Greater Baltimore Board of Realtors monitors, through its staff, all real estate classified advertising to review usage of components outlined in the fair housing guidelines. Should errors be noted, brokers are immediately reminded of the examples of practice, usage and content recommended.

At the request of the Greater Baltimore Board of Realtors, the Baltimore Sun, in February of this year, agreed to publish the U.S. Department of Housing and Urban Development's publishers notice about equal housing opportunity in housing on every page of classified advertising. This is the first paper in the country to agree to do this, to demonstrate our commitment to equal housing.

Despite this record of leadership in equal housing opportunity—and I have left out some things that we have been doing—in late as 1983, Baltimore Neighborhoods, Inc., a local civil rights housing organization filed some 161 complaints against various real estate brokers in the Maryland area, a majority of which were members of the Greater Baltimore Board of Realtors.

The allegations contained in the complaints concerning the respondents were (1) that they alleged failure to include the fair housing slogan and logo in classified advertising, and (2) alleged illegal selective use of newspapers of limited circulation for classified advertising. In our opinion, an opinion that was later substantiated by HUD, the BNI complaints were improper both procedurally and on the merits.

To make a long story short, Senator, after having put together a collective defense mechanism to defend the innocent realtors who were charged with these violations, these violations were dismissed and it was only through an organized response to this litigation, was the defense of realtors who were innocent of all these charges, made affordable.

The Greater Baltimore Board of Realtors vigorously pursued the defense of its members because indeed they were doing nothing wrong.

There was an organizational meeting put together to provide an organized defense to these complaints, and following that meeting, there were months of protracted and costly negotiations with HUD officials in Philadelphia and Washington, as well as with State officials in Maryland, with the Human Relations Commission in Maryland, which is the certified agency in Maryland that handles such complaints.

Nearly 1 year later, and after the expenditure of over $40,000 in legal fees, the Secretary of HUD withdrew all of the BNI complaints from the Maryland Human Relations Commission and for the first and only time that we know of the Secretary dismissed all complaints "as the complainants' allegations were not substantiated."

Mr. Chairman, had not the trade associations, the National Association of Realtors and the Greater Baltimore Board of Realtors, organized this collective defense it is possible that the realtors in Baltimore would have had to individually defend themselves,

having spent in excess of $200,000 in legal fees, based on this experience.

We have some problems, obviously, with the imposition of the administrative law judges and the extraordinarily exorbitant fines that are proposed in S. 558, based on our previous experiences and what we conceive to be the unnecessary additional bureaucratic layer imposed in S. 558. We are opposed to this proposed legislation on that basis, and I do have some documents substantiating those experiences that I would like to leave with the committee.

Thank you.

[The following material was submitted for the record:]

TESTIMONY BEFORE U.S. SENATE SUBCOMMITTEE ON THE CONSTITUTION

APRIL 2, 1987

Fletcher R. Hall

Executive Vice President

Greater Baltimore Board of REALTORS®

Mr. Chairman, I am Fletcher R. Hall, Executive Vice President of the Greater Baltimore Board of REALTORS® in Baltimore, Maryland. I am accompanied today by Mr. James J. Casey, President of the Board and Mr. Arthur E. Davis III, President-Elect of the Board.

The Greater Baltimore Board of REALTORS® is America's oldest organized real estate Board, founded in 1858.

The Greater Baltimore Board of REALTORS® is proud of its nationally recognized leadership role in encouraging and promoting fair housing as evidenced by the first Fair Housing Practices Award presented to Greater Baltimore Board of REALTORS® by Baltimore Neighborhoods, Inc. in 1965 "in recognition of affirmative action to eliminate discrimination in housing and for housing industry leadership toward the goal of equal housing opportunity."

The Greater Baltimore Board of REALTORS® was the recipient of the HUD Fair Housing Achievement Award in the Public/Private Partnership Category in 1985.

The Greater Baltimore Board of REALTORS® is one of the few real estate Boards in the nation which requires continuing education training in equal housing opportunities in order for a REALTOR® to maintain membership in the Board.

The Greater Baltimore Board of REALTORS® has vigorously and constantly encouraged its members to comply with Equal Opportunity laws and Guidelines and, in fact, has one of the highest compliance rates among Boards of REALTORS® in the nation according to the findings of the 1986 Voluntary Affirmative Marketing Agreement review conducted by the Baltimore regional HUD office.

The Greater Baltimore Board of REALTORS® was the first real e[illegible] Board in the nation to sign the Voluntary Affirmative Marketing Agreement between HUD and

the National Association of REALTORS®, in 1976.

Member firms of the Greater Baltimore Board of REALTORS® are complying with the components of the Voluntary Affirmative Marketing Agreement which pertain to fair housing advertising as outlined in the Fair Housing Guidelines, 24 CFR, Part 109, as published.

This year, Greater Baltimore Board of REALTORS® is engaging in a number of activities to encourage not only compliance with advertising guidelines, but to educate and remind our members of all components contained in the Voluntary Affirmative Marketing Agreement.

Additionally, Greater Baltimore Board of REALTORS® staff monitors all real estate classified ads to review usage of components outlined in the Fair Housing Guidelines. Should errors be noted, Brokers are immediately reminded of the examples of practices, usage and content recommended.

At the request of the Greater Baltimore Board of REALTORS®, the Baltimore Sun newspaper in February 1986, agreed to publish the U.S. Department of Housing and Urban Development (HUD) Publisher's Notice about equal opportunity in housing on every full page of real estate classified advertising.

According to National Association of REALTORS® officials, The Baltimore Sun is the first major newspaper that has decided to donate the space for publication of the equal-opportunity notice on each full page of its real estate classified advertisements.

National Association of REALTORS® and HUD had agreed in the latest Memorandum of Understanding accompanying their Voluntary Affirmative Marketing Agreement (VAMA) that they would work toward persuading newspapers to run the equal opportunity notice on each full page of that advertising. The Greater Baltimore Board of REALTORS® led the way in achieving this objective.

The notice basically indicates a newspaper's refusal to accept advertising that violates the 1968 Fair Housing Act and confirms that the properties advertised are available on an equal-opportunity basis.

Despite this record of leadership in equal housing opportunity, in late 1983 Baltimore Neighborhoods, Inc. a local civil rights, housing organization, filed some 161 complaints against various real estate brokers in the Maryland area, the majority of which were members of the Greater Baltimore Board of REALTORS®.

Of the 161 complaints filed by BNI, 108 were deferred to the Maryland Human Relations Commission (MHRC), six were deferred to the Howard County Commission on Human Rights, and HUD retained jurisdiction over the remaining 47.

The allegations contained in the complaints concerning the respondents (1) alleged failure to include the fair housing slogan or logo in classified advertisements and (2) alleged illegal selective use of newspapers of limited circulation for classified advertising. It was our opinion that the BNI complaints were improper both procedurally and on the merits.

These complaints were accompanied by a Pre-Determination Settlement Agreement from the Maryland Human Relations Commission demanding that respondents contribute $500.00 to Baltimore Neighborhoods, Inc., (the group filing the complaints), and would have required that this same group (BNI) provide training to all of respondents' personnel responsible for advertising.

Upon the demand of the Baltimore Board of REALTORS® and our counsel these extortion measures were removed from the proposed Pre-Determination Settlement Agreement, since such measures violated State law, and were included in the document initially at the request of Baltimore Neighborhoods, Inc., the plaintiffs in this matter.

Having reviewed with counsel for the National Association of REALTORS® and counsel for the Baltimore Board, the complaints which were filed, in the light of the regulations governing advertising promulgated by HUD and the Affirmative Marketing Agreement negotiated between HUD and the National Association of REALTORS®, it appeared that these complaints were substantially without substance.

The National Associaton of REALTORS® worked with the Baltimore Board and those members of the Board who had received complaints from Baltimore Neighborhoods, Inc. in preparing and presenting an organized, collective defense. Only through an organized response to this litigation was the defense of innocent REALTORS® made affordable.

The Greater Baltimore Board of REALTORS® vigorously pursued the defense of its members who were named as respondents in complaints of discrimination filed by Baltimore Neighborhoods, Inc. with the Department of Housing and Urban Development.

The President and Executive Vice President of the Board, as well as the Board's attorneys, maintained frequent contact with representatives of the Maryland Human Relations Commission to present the Board's position with respect to BNI's complaints. In particular, the Board and its attorneys successfully maintained that those of its members who were signatories to the Voluntary Affirmative Marketing Agreement between HUD and the National Association of REALTORS® had not violated the law by failing to use the EHO slogan or logo in classified advertising. This Agreement stated that so long as advertising is placed in a newspaper which carries the "publisher's notice" on the lead page of the real estate classifieds, the EHO slogan or logo need not be placed in the individual REALTOR'S® classified advertisement.

The President and the Executive Vice President maintained frequent contact with William D. North, then Senior Vice President and General Counsel of the National Association of REALTORS®, on this issue. On behalf of the Board, we requested the National Association to present this issue to HUD's general counsel in order to get the complaints dismissed as quickly as possible.

Mr. North met with some 60 Board members on March 2, 1984, at the Board's offices, to discuss the preparation of a collective defense group against the BNI complaints. The Board's attorneys were also present at this meeting to provide assistance.

This meeting was followed by months of protracted and costly negotiations with HUD officials in Philadelphia and Washington, D.C., as well as with state officials of the Maryland Human Relations Commission, the certified agency in Maryland.

Nearly one year later, and after the expenditure of over $41,000 in legal fees, the Secretary of HUD withdrew all of the BNI complaints from the Maryland Human Relations Commission, and dismissed all complaints, "as the Complainant's allegations were not sustained."

Mr. Chairman, had not the trade associations (National Association of REALTORS® and Greater Baltimore Board of REALTORS®) organized a collective defense mechanism to secure the above mentioned result it is estimated that the REALTOR® firms falsely charged would have expended in excess of $200,000 in

legal fees to have adjudicated these complaints before the Maryland Human Relations Commission, and subsequently through the Maryland Courts, as well as before HUD.

Mr. Chairman, the imposition of a new adjudicative layer, the Administrative Law Judges, and the extraordinarily exorbitant fines contained in S. 558 would substantially increase the already precarious situation in which real estate practitioners, mortgage bankers, S & L officials, appraisers, etc., find themselves when facing frivolous and unsubstantiated complaints filed by self appointed "housing advocates", who wish to use settlements from these complaints to enrich the budgets of their organizations.

S. 558 fails to contain corresponding liability for those who bring these frivolous complaints and does not provide for punitive damages.

Due to the reality of experiences alluded to in this testimony, and the further potential for disaster contained in the proposed legislation before this subcommittee, we oppose passage of S. 558. These proposed provisions are unwarranted, unnecessary and could effectively put REALTORS® and others associated with the housing industry out of business without due process.

Thank you for the opportunity to provide this testimony to the subcommittee.

78-076 O - 88 - 10

STATE OF MARYLAND

COMMISSION ON HUMAN RELATIONS

20 EAST FRANKLIN STREET
BALTIMORE, MARYLAND 21202-2274
(301) 659-1700
TTY for Deaf (301) 659-1737

GOVERNOR
HARRY HUGHES

COMMISSIONERS
JAMES C. FLETCHER, JR.
CHAIRMAN
SUSAN P. LEVITON
VICE CHAIRPERSON
WM. A. LEE CLARKE, III
CLARA CLOW
JEAN A. CREEK
PHYLLIS J. ERLICH
LEONARD D. JACKSON, SR.
MARY MALLEY
SILVIA S. RODRIGUEZ

OFFICERS
DAVID L. GLENN
EXECUTIVE DIRECTOR
ELINOR H. KERPELMAN
DEPUTY DIRECTOR
VERNON C. WINGENROTH
ASSISTANT DIRECTOR
RISSELLE ROSENTHAL FLEISHER
GENERAL COUNSEL

December 5, 1983

Mr. James Piper, III
10807 Falls Road
Suite 300
Lutherville, Maryland 21093

Re: Baltimore Neighborhoods, Inc.
vs.
Piper & Company, Inc.
MCHR#: DH1183-C1060-RA-472
HUD#: 84-10-034 (200)

Dear Mr. Piper:

The referenced complaint has been deferred to the Maryland Commission on Human Relations (MCHR) by the U.S. Department of Housing and Urban Development (HUD). Under the contractual agreement between MCHR and HUD, MCHR will process the case and attempt to resolve the matter. A copy of the complaint is enclosed for your reference.

In an effort to provide the parties with an opportunity to expeditiously resolve this matter, the Commission's staff has prepared a proposed Pre-Determination Settlement Agreement (PDS). The enclosed Agreement was designed to address the issue(s) raised in the complaint. You are invited to consider this Agreement as a means of resolving the complaint and, thus eliminating the need for an extended investigation. In the event that you elect to enter into the Agreement and Baltimore Neighborhoods, Inc., as Complainant, does not, provisions #7 and #8 will have to be deleted from the Agreement. Please be advised that provision #14 has been included at BNI's request. If you are interested in entering into this Agreement, the undersigned must be notified within ten (10) days of receipt of this letter.

If you are not interested in the Pre-Determination Settlement Agreement, the matter will be investigated and a finding will be issued. In an effort to secure adequate information for this investigation, a Request for Information has been enclosed. Please respond to this Request for Information within thrity (30) days of your receipt of this letter. If additional information or a site visit is requested, you will be notified.

It is my sincere hope that this matter can be resolved to everyone's satisfaction. Your cooperation throughout the deliberations will be appreciated.

If you need clarification regarding the material enclosed in this packet, please feel free to contact me.

Sincerely,

Lydell Scott
Intergroup Relations
Representative
(301) 659-1773

LS/vs

Enclosures

U.S. Department of Housing and Urban Development
Philadelphia Area Office, Region III
Curtis Building
625 Walnut Street
Philadelphia, Pennsylvania 19106

OCT 25 1983

Mr. James Piper, III
Piper & Company
10807 Falls Road, Suite 300
Lutherville, MD 21093

Dear Mr. Piper:

Subject: BNI vs Piper & Company
03-84-10-034(200)

This letter is to inform you that we have notified the State of Maryland Commission on Human Relations of the housing discrimination complaint filed against you with this Department by Baltimore Neighborhoods, Inc. on October 13, 1983. We are required by law to notify this agency of complaints which fall under its jurisdiction since it has been determined that the law which it administers offers rights and remedies which are substantially equivalent to those provided by the Federal law.

If the agency does not commence action on the complaint within thirty (30) days and proceed with reasonable promptness once action has been commenced, we will reactivate the case and proceed under Federal law. In such event, you will be advised.

In addition, the complainant has the right to bring action under Section 812 of Title VIII any time within 180 days after the alleged discriminatory act occurred, or under the Civil Rights Act of 1866 as interpreted by the United State Supreme Court in the case of Jones vs Mayer. Such action may be brought in any appropriate Federal, State, or local court.

Any questions you may have regarding this complaint should be addressed to:

Mr. Eric P. Johnson
Director, Housing Division
State of Maryland
Commission on Human Relations
20 East Franklin Street
Baltimore, MD 21202

Some explanatory material on the law is enclosed for your information.

Sincerely,

Robert H. Byers Jr.

For William M. Cousins
Acting Director
Office of Regional Fair Housing
and Equal Opportunity

Form Approved
OMB No. 63-R1225

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

HOUSING DISCRIMINATION COMPLAINT

FOR HUD USE ONLY

Number
Date
Filing Date
STATE OR LOCAL
FEDERAL COVERAGE
PRIOR ACTION
PRELIMINARY DETERMINATION

INSTRUCTIONS: Read this form and the instructions on reverse carefully before completing. All questions should be answered. However, if you do not know the answer or if a question is not applicable, leave the question unanswered and fill out as much of the form as you can. Your complaint should be signed, dated and, if possible, notarized. Where more than one individual or organization is filing the same complaint, and all information is the same, each additional individual or organization should complete boxes 1 and 2 of a separate complaint form and attach it to the original form. Complaints may be (1) mailed to the Regional Office covering the State where the complaint arose (see list at end of form), to an Area Office, or to Fair Housing, HUD, Washington, D.C. 20410, or (2) filed or presented in person at HUD in Washington, D.C. or at any HUD Regional or Area Office.

PLEASE TYPE OR PRINT

1. Name of aggrieved person or organization *(Last Name-First Name-Middle Initial) (Mr., Mrs., Miss, Ms.)*

Don Miller for Baltimore Neighborhoods, Inc.

TELEPHONE NUMBER(S): Home — Business: 243-4400

Street Address, City, County, State and ZIP Code

319 East 25th Street/ Baltimore, Maryland 21218

2. Against whom is this complaint being filed?

Name (Last Name-First Name-Middle Initial)	Street Address, City, County, State and ZIP Code	Telephone Number
James Piper, III	10807 Falls Road Suite 300 Lutherville, Md 21093	

Is the party named above a: *(Check applicable box or boxes)*

[ ] Builder [ ] Owner [X] Broker [ ] Salesperson [ ] Supt. or Manager [ ] Bank or Other Lender [ ] Other

If you have named an individual above who appeared to be acting for a company in this case, check this box [ ] and write the name and address (street, City, County, State and ZIP Code) of the company, in this space.

Piper & Co, Inc (address as above)

Name and Identify Others *(If any)* you believe violated the law in this case.

3. What did the person you are complaining against do? *(Check applicable box or boxes)*

[ ] Refuse to rent, sell, or deal with you
[ ] Discriminate in the conditions or terms of sale, rental, occupancy, or in services or facilities
[ ] Make a statement in a discriminatory way
[ ] Say (that) housing was available
[ ] Engage in blockbusting
[ ] Discriminate in financing
[ ] Discriminate in broker's services
[ ] Other (Explain in box 6 below)

When did (the last act occur) (the acts occur) (include most recent if several dates are involved)

21, 1983

4. Do you believe there was discrimination because of? *(Check applicable box.) See back of this sheet for Racial Categories.*

[X] Race or Color
[ ] White [ ] Hispanic
[ ] Black [ ] Asian or Pacific Islander
[ ] American Indian and Alaskan Native

[ ] Religion *(Specify)*
[ ] Sex
[ ] Male [ ] Female
[ ] National Origin *(Specify)*

5. What kind of house or property was involved?

[X] Single family house
[ ] A house or building for 2, 3, or 4 families
[ ] A building for 5 families or more
[ ] Other, including vacant land held for residential use *(Explain in box 6)*

Did the owner live there?

[ ] Yes [ ] No [X] Unknown

Is the house or property *(Check applicable box)*

[X] Being sold [ ] Being rented

What is the address of the house or property?

Street
City
County State

6. Tell what you think happened. Use this space for a brief and concise statement of the facts. Additional details of what happened, and names of witnesses may be listed on an attachment.

Advertisements placed in a manner that indicates a preference and/or limitation based on race and makes no [illegible] mention in violation of Sec 804 (c) of Title VIII and Federal Fair Housing Advertising Regulations.

I authorize HUD to furnish a copy of the complaint to the person or organization against whom the complaint is made. I affirm that the facts in this complaint *(including any attachments)* and that it is true to the best of my knowledge, information and belief.

Donald G. Mellin
(Signature)

NOTARIZATION

Sworn to (or affirmed) before me this [illegible] day of October 19 83

[illegible]
(Notary Public)

BEST AVAILABLE COPY

PIPER

Are you being transferred to Baltimore or anywhere in the U.S.A.? Piper & Co. and our Homes for Living affiliates have developed a TOLL FREE system to give you the information you need about your future new home area. Call 1-800-525-8910 ext. 9253 for clear, courteous answers to your questions.

OPEN HOUSES SUNDAY

NOB HILL—NEW LISTING OPEN 1-4
[illegible]

BOWLEYS QUARTERS—NEW LISTING OPEN 12-2
[illegible]

JARRETTSVILLE OPEN 2-4
[illegible]

GREENCROFT—HUNT VALLEY OPEN 2-5
[illegible]

LUTHERVILLE OPEN 2-4
[illegible]

COCKEYSVILLE TOPFIELD—NEW LISTING OPEN 2-4
[illegible]

HAMPTON GARDENS OPEN 1-4
[illegible]

GREENSPRING VALLEY OPEN 2-4
[illegible]

GREENCROFT OPEN 3-5
[illegible]

HOMELAND OPEN 3-5
[illegible]

NEW HOMES OPEN TODAY

"THE RISTEAU" OPEN 11-5
[illegible]

INNER HARBOR—OTTERBEIN OPEN 1-5
[illegible]

THE MEADOWS OF GREENSPRING OPEN 12-5
[illegible]

FALLS RD AREA OPEN 1-[illegible]
[illegible]

FIVE FARMS OPEN 2-[illegible]
[illegible]

STONELEIGH OPEN 1-[illegible]
[illegible]

GLYNDON AREA OPEN 2-[illegible]
[illegible]

SPRINGDALE OPEN 1:30-[illegible]
[illegible]

CEDARCROFT OPEN 1-[illegible]
[illegible]

FALLSTON—NEW LISTING OPEN 2-[illegible]
[illegible]

STONELEIGH OPEN 12:30-2:5[illegible]
[illegible]

$200,000 AND OVER

[illegible]

$125,000-200,000

[illegible]

$100,000-$125,000

[illegible]

BUTLER—Brick rancher on 1+ Acre. 3 BRs, FR, large kit. private setting & fenced yard. $81,500. Jun Boone, 667-6100/343-0845, 115 FALL

SPRINGLAKE—4 BR 2½ bath 4 level split. 2 fplc, gar. FR, deck, pvt yard. $123,900. Mary Durling, 833-4539/666-7610, 125 HARI

SHETLAND HILLS—3 BR, 2½ bath split with garage. Bright, w/FR & screened porch on ½ Acre. CAC, great location. Bea Parker, 667-6100/823-8456, 131 SHE

BEACON HILL—BR MOL at— Owner trans. must sell. 3 OR split w/custom W/W to CAC, new 2 story. $80,1 B Carson, 823-2323, 194 GAS

PARKVILLE—4 BR, 2½ bath split foyer in quiet Cul-de-sac. FR w/fp, garage, CAC, gas HL many amenities. C. Hudson, 296-8250/823-2323, (B OVE)

CARROLL CO—**ASPEN RUN**—4 BR, 3½ level. 2 Baths, lab cabinets/B.A.s. Bay wood stove, CAC, W/W, + shaker apt. Ed Mayer, 666-4973/823-2323, 104 HOU

MADISON PARK—Rancher. 2 units. Perfect owner's unit w/3 BRs, spare stair, gourmet kit, lower bath, all new systems. T. Scobick, 235-3746/727-3720 (20 NOR)

PARKVILLE—Rancher. Dbl house. 4 BRs, 1½ ba, FR, cluster & office above grounds, 2,000 sq. cement cond. open space in rear yd. $80's. T.L. Pratt, 628-1600/667-6100, 84 WEHR

ATTENTION: 3 BR 2½ bath split w/ apartment to rent. By owner only. Must be permanent. Call 256-2786/821-1700 (AB LOU)

FEDERAL HILL—4 BR rehab w/garage + CAC. Assume 8.5% at 9.5%. Seller will finance at 10%. Helen Cole, 727-3720, (115 HIL)

$50,000-$75,000

[illegible]

INNER HARBOR WEST—6 unit w/ 2 BR exposed brick. Yr. round. Tot. private fenced yard. Ea. apt. has own H & W/D. 366-3815, 727-3720 (B1 W BAL)

2708 N. CALVERT ST—$72,500 for this attractive 6 BR, 2½ bath townhse. Ctr. as Vlg. original features. Call [illegible]

CANDLEWOOD—Lease-Purchase 2½ years. 3 BR town home in 365. 2½ bath, DR, bay window, fireplace. Call 366-3827/667-6100, 64 WEST

UNDER $50,000

[illegible]

MORE ANDTOWN—Brick row house—[illegible] 824-3003, 4, Seydel, 727-3720, (12 NEL)

MT. WASHINGTON—Well maintained cottage. 2 BRs, 1½ bath, gas heat, large fenced yard. Perfect for young couple. Peggy Sauer, 235-4320/821-1700, (12 MAR)

HAMPDEN-TOWSON—Quiet, tree shaded [illegible]

MILL REDUCED—[illegible]

MILLBROOK OWEN—[illegible]

HAMPDEN—[illegible]

FEDERAL HILL—[illegible]

CANNON—[illegible]

ELLICOTT CITY—[illegible]

BRYANT—[illegible]

UPPER FELLS POINT—[illegible]

THE FOLLOWING FINE HOMES ALSO BH Seen By Appointment Only

J 7/17/83 PIPER & CO F-21

SELF CONTAINED 3 APT. HOUSE ... Ideal for investor as ... 1 BR w/study ... & Heat. Great location near Bussine ... Rare 4/3% (802)/821-1700 (42 BAY)

RAILSTREET — 7 Victorian garden fronts, 4 units ... ... potential, long term tenants, 19 units. Jane ... 727-3720. (22 PAT)

MULTI USE SHELL located near downtown business district ... of frontage, 11ft, zoned OR3, great area. Ted Cumstead, 727-3720 (16 STP)

FEDERAL HILL — Hist. Corner — Obl bldg gets adjacent bldg ... Many imaginative developments priced right. Betty Ehlich 837-3264/727-3720. (10 HAN)

BUTCHERS HILL — REDUCED — Rehab & get historic Tax Credit. 9 yr 1 or pkg 2 to 4. Harbor Views. 3 & 4 apts. Betty Ehlich 837-3264/727-3720. (20 PRA)

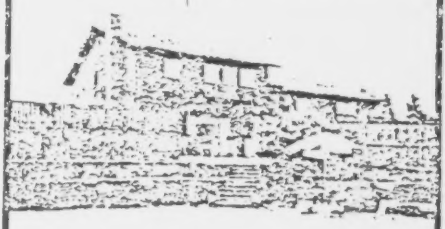
UPPER FELLS POINT — 4 BR home in one of Balto's most promising areas. Great property for investor or owner occ. Ted Cumstead 727-3720. (11 CHE)

RIVERSIDE PK — EOG Streetfront — Formerly zoned Groc. & 1 apt. Future ... your liking, priced in teens. Eva Bix 727-3720. (18 JAC)

n/11x15

J 9T 7/15/83 P-126

PIPER & CO., INC.



VALLEY HILLS

3309 WALNUT AVE. **OPEN SUN. 1-5**

OWNER WANTS OFFER! Must Sell! 5 bedrm., 2½ baths, superb tri-level, CAC, Inground pool, family rm. w/fireplace, amenities.

JEAN ECKHARDT **828-5873 (H)**
821-1700 (O)

SN 7/31/83 F-20

INVESTMENT PROPERTIES (533)	INVESTMENT PROPERTIES (533)

J PIPER & CO.

HAMPDEN STORE—Roland Ave. w/lg apt. above, also rental ... store, rear garage w/ rear owner financing. Peggy Sloan, 235-4300/321-1700. (36 ROL)

2 BLDGS—2 APTS EACH! Separate heating & meters, small assumable & owner 2nd mtg. available. Good cash flow. Dan Cummins, 727-3720 (17 LAF)

DUNDALK PROFESSIONAL OFFICE or store. Prime location in new Industrial Park. Lg. apt. above, parking rear. Peggy Sloan, 235-4300/821-1700. (87 HOL)

FELLS POINT—Shop w/ residence living & studio above. R. Cole, 727-3720. (16 THA)

PARKFRONT—7 Victorian garden fronts, 4 units ... potential, long term tenants, 19 units. Jane ... 727-3720. (22 PAT)

MULTI USE SHELL located near downtown business district ... of frontage, 11ft, zoned OR3, great area. Ted Cumstead, 727-3720 (16 STP)

S. BALTIMORE—2 apt. EOG. 1-1 BR, 1 2BR. Duplex, separate ... & electric, all units on elec. plumbing & heating. Ted Cumstead 727-3720. (13 OST)

UPPER FELLS PT.—4 BR home in one of Balto's most promising ... great property for investor or owner occ. Ted Cumstead 727-3720. (11 CHE)

n/31x15

Mero 7/20/83 P 31

BUXTON
New Listing

Dramatic redwood & stone Contemporary on Lake Roland. Exquisite use of wood, stone & glass compliment wooded privacy. 5 BR's & family room.

Peggy Sloan
235-4300

Marta DeLano
323-2273

Piper & Co. 1 MEL

RECEIVED
... 3 ...
Housing Div. ...

STATE OF MARYLAND
COMMISSION ON HUMAN RELATIONS

20 EAST FRANKLIN STREET
BALTIMORE, MARYLAND 21202-2274
(301) 659-1700
TTY for Deaf (301) 659-1737

OFFICERS
DAVID L. GLENN
EXECUTIVE DIRECTOR
ELINOR H. KERPELMAN
DEPUTY DIRECTOR
VERNON C. WINGENROTH
ASSISTANT DIRECTOR
RISSELLE ROSENTHAL FLEISHER
GENERAL COUNSEL

GOVERNOR
HARRY HUGHES

COMMISSIONERS
JAMES C. FLETCHER, JR.
CHAIRMAN
SUSAN P. LEVITON
VICE CHAIRPERSON
WM. A. LEE CLARKE, III
CLARA CLOW
JEAN A. CREEK
PHYLLIS J. ERLICH
LEONARD D. JACKSON, SR.
MARY MALLEY
SILVIA S. RODRIGUEZ

JOINT PRESS RELEASE OF Piper & Company, Inc.,
THE BALTIMORE NEIGHBORHOODS, INC. AND THE
MARYLAND COMMISSION ON HUMAN RELATIONS

Baltimore Neighborhoods, Inc., The Maryland Commission on Human Relations, and Piper & Company, Inc. announce that they have entered into an Agreement to assure non-discriminatory advertising practices in compliance with Maryland's Fair Housing Law and Title VIII of the Civil Rights Act of 1968. It is anticipated that through affirmative advertising, which includes the usage of "equal housing opportunity" and corresponding symbol in all ads, rental and sales opportunities will be more accessible to minority groups. The Agreement also provides for members of the real estate firm to receive training in equal advertising practices.

STATE OF MARYLAND
COMMISSION ON HUMAN RELATIONS

20 EAST FRANKLIN STREET
BALTIMORE, MARYLAND 21202-2274
(301) 659-1700
TTY for Deaf (301) 659-1737

OFFICERS
DAVID L. GLENN
EXECUTIVE DIRECTOR
ELINOR H. KERPELMAN
DEPUTY DIRECTOR
VERNON C. WINGENROTH
ASSISTANT DIRECTOR
RISSELLE ROSENTHAL FLEISHER
GENERAL COUNSEL

GOVERNOR
HARRY HUGHES

COMMISSIONERS
JAMES C. FLETCHER, JR.
CHAIRMAN
SUSAN P. LEVITON
VICE CHAIRPERSON
WM. A. LEE CLARKE, III
CLARA CLOW
JEAN A. CREEK
PHYLLIS J. ERLICH
LEONARD D. JACKSON, SR.
MARY MALLEY
SILVIA S. RODRIGUEZ

RE: Baltimore Neighborhoods, Inc.
vs.

Dear

On or about , you were sent a packet regarding the above referenced matter. You were given thirty (30) days to submit your responses to the Request for Information or to resolve this matter through a Pre-Determination Settlement Agreement. This is the second request for your responses to the information request. The Commission's staff will be able to bring this matter to a rapid determination with your cooperation. Please submit your complete responses to the Request for Information within ten (10) days of your receipt of this letter.

If you have signed a voluntary fair housing agreement with HUD and/or the Greater Baltimore Real Estate Board, submit a copy of the title page, signature page and each page applicable to advertising.

We wish to remind you that the Commission does have the power to issue subpoenas for information relevant to this investigation.

Thank you for your cooperation.

Sincerely,

Intergroup Relations Representative
(301) 659-17

STATE OF MARYLAND

COMMISSION ON HUMAN RELATIONS

20 EAST FRANKLIN STREET
BALTIMORE, MARYLAND 21202-2274
(301) 659-1700
TTY for Deaf (301) 659-1737

OFFICERS
DAVID L. GLENN
EXECUTIVE DIRECTOR
ELINOR H. KERPELMAN
DEPUTY DIRECTOR
VERNON C. WINGENROTH
ASSISTANT DIRECTOR
RISSELLE ROSENTHAL FLEISHER
GENERAL COUNSEL

GOVERNOR
HARRY HUGHES

COMMISSIONERS
JAMES C. FLETCHER, JR.
CHAIRMAN
SUSAN P. LEVITON
VICE CHAIRPERSON
WM. A. LEE CLARKE, III
CLARA CLOW
JEAN A. CREEK
PHYLLIS J. ERLICH
LEONARD D. JACKSON, SR.
MARY MALLEY
SILVIA S. RODRIGUEZ

RE: Baltimore Neighborhoods, Inc.
vs.

Dear :

In accordance with our telephone conversation of I am writing to advise that the deadline has passed for receipt of your responses to the Request for Information in the referenced matter.

Please forward the appropriate responses to the undersigned within ten (10) days of receipt of this letter.

In the event that you do not provide responses to the Request for Information, please be advised that the Commission does have the statutory authority to issue subpoenaes for information relevant to this investigation.

If you have any questions regarding the information request, please contact me at (301) 659-17 .

Thank you for your cooperation.

Sincerely,

Intergroup Relations Representative

STATE OF MARYLAND
COMMISSION ON HUMAN RELATIONS

20 EAST FRANKLIN STREET
BALTIMORE, MARYLAND 21202-2274
(301) 659-1700
TTY for Deaf (301) 659-1737

OFFICERS
DAVID L. GLENN
EXECUTIVE DIRECTOR
ELINOR H. KERPELMAN
DEPUTY DIRECTOR
VERNON C. WINGENROTH
ASSISTANT DIRECTOR
RISSELLE ROSENTHAL FLEISHER
GENERAL COUNSEL

GOVERNOR
HARRY HUGHES

COMMISSIONERS
JAMES C. FLETCHER, JR.
CHAIRMAN
SUSAN P. LEVITON
VICE CHAIRPERSON
WM. A. LEE CLARKE, III
CLARA CLOW
JEAN A. CREER
PHYLLIS J. ERLICH
LEONARD D. JACKSON, SR.
MARY MALLEY
SILVIA S. RODRIGUEZ

RE: Baltimore Neighborhoods, Inc.
vs.

Dear

The referenced complaint has been deferred to the Maryland Commission on Human Relations (MCHR) by the U.S. Department of Housing and Urban Development (HUD). Under the contractual agreement between MCHR and HUD, MCHR will process the case and attempt to resolve the matter. A copy of the complaint is enclosed for your reference.

In an effort to provide the parties with an opportunity to expeditiously resolve this matter, the Commission's staff has prepared a proposed Pre-Determination Settlement Agreement (PDS). The enclosed Agreement was designed to address the issue(s) raised in the complaint. You are invited to consider this Agreement as a voluntary means of resolving the complaint and, thus eliminating the need for an extended investigation. In the event that you elect to enter into the Agreement and Baltimore Neighborhoods, Inc., as Complainant, does not, provisions #7 and #8 will have to be deleted from the Agreement. Please be advised that provision #14 has been included at BNI's request and is not required by the Commission. If you are interested in entering into this Agreement, the undersigned must be notified within ten (10) days of receipt of this letter.

If you are not interested in the Pre-Determination Settlement Agreement, the matter will be investigated and a finding will be issued. In an effort to secure adequate information for this investigation, a Request for Information has been enclosed. Please respond to this Request for Information within thirty (30) days of your receipt of this letter. If additional information or a site visit is requested, you will be notified.

It is my sincere hope that this matter can be resolved to everyone's satisfaction. Your cooperation throughout the deliberations will be appreciated.

If you need clarification regarding the material enclosed in this packet, please feel free to contact me.

Sincerely,

Intergroup Relations Representative
(301) 659-17

Enclosures

REQUEST FOR INFORMATION

Baltimore Neighborhoods, Inc. vs.

1. Does your real estate firm have a non-discriminatory, fair housing policy? Have you provided a printed copy of this policy to each employee of your firm? Please provide a copy of such notice.

2. What is your advertising policy? How is it implemented?

3. Do you use the Equal Housing Opportunity logo or slogan in your advertisements? If so, please provide documentation. If not, please explain.

4. State the reason(s) why Respondent did not include Fair Housing Opportunity logo/slogan in the advertisement noted in the complaint/attachment.

5. Do your sales person/agents place their own advertisements of properties for sale or rent? If so, what specific instructions are they given concerning such advertisements?

6. For the past six months provide a list which states the address of all properties sold and rented and the race of the person who bought or rented the property.

7. Of the total number of persons who list properties through your business what percentage is from the Black population?

8. List all newspapers, billboard, magazines, broadcast media and community newspapers you advertised in the past six months. For each state the total number of advertisements, and list the number of advertisements which included the Equal Housing Opportunity logo or statement. Please provide any available documentation.

9. If you are presently executing a voluntary fair housing advertising or fair marketing campaign, provide a copy of the plan and your most current evaluation of the plan.

10. Please submit any additional comments and/or information you feel would be relevant in this matter.

11. Please indicate if you have signed the Voluntary Affirmative Marketing Agreement (VAMA) with HUD and your Local Board of Realtors. If you have signed the VAMA, please include a copy of the signed Agreement.

STATE OF MARYLAND
COMMISSION ON HUMAN RELATIONS

20 EAST FRANKLIN STREET
BALTIMORE, MARYLAND 21202-2274
(301) 659-1700
TTY for Deaf (301) 659-1737

OFFICERS
DAVID L. GLENN
EXECUTIVE DIRECTOR
ELINOR H. KERPELMAN
DEPUTY DIRECTOR
VERNON C. WINGENROTH
ASSISTANT DIRECTOR
RISSELLE ROSENTHAL FLEISHER
GENERAL COUNSEL

GOVERNOR
HARRY HUGHES

COMMISSIONERS
JAMES C. FLETCHER, JR.
CHAIRMAN
SUSAN P. LEVITON
VICE CHAIRPERSON
WM. A. LEE CLARKE, III
CLARA CLOW
JEAN A. CREEK
PHYLLIS J. ERLICH
LEONARD D. JACKSON, SR.
MARY MALLEY
SILVIA S. RODRIGUEZ

JOINT PRESS RELEASE OF THE BALTIMORE NEIGHBORHOODS, INC AND THE MARYLAND COMMISSION ON HUMAN RELATIONS

Baltimore Neighborhoods, Inc., The Maryland Commission on Human Relations, and announce that they have entered into an Agreement to assure non-discriminatory advertising practices in compliance with Maryland's Fair Housing Law and Title VIII of the Civil Rights Act of 1968. It is anticipated that through affirmative advertising, which includes the use of "equal housing opportunity" and corresponding symbol in all ads, rental and sales opportunities will be more accessible to minority groups. The Agreement also provides for members of the real estate firm to receive training in equal advertising practices.

PRE-DETERMINATION SETTLEMENT AGREEMENT

IN THE MATTER OF:

Baltimore Neighborhoods, Inc.

Complainant

vs.

Piper & Company, Inc.

Respondent

Case Numbers:

MCHR - DH1183-C1060-RA-472
HUD - 84-10-034 (200)

WHEREAS, a complaint has been filed with the Maryland Commission on Human Relations (hereinafter referred to as the "Commission") charging the Respondent with violations of Article 49B, Annotated Code of Maryland;

WHEREAS, the Respondent denies that it has engaged in any act or practice violative of any of the provisions of the said Article 49B and Respondent's execution of this Agreement is to be construed only as a desire to comply with the provisions of Article 49B and shall not be in any way deemed an admission of any violation of law;

WHEREAS, the Respondent acknowledges that this Agreement upon execution becomes an order of the Commission pursuant to Section 10(c) of Article 49B, Annotated Code of Maryland;

NOW, therefore, the parties hereto in consideration of the mutual covenants recited herein agree as follows:

1. The terms of this Agreement shall commence on the date of execution by the parties and extend for a period of two (2) years. The parties hereto may extend the terms of this Agreement by written amendment.

2. The Respondent agrees to designate a specific individual as the Respondent's representative for the purpose of the administration of this Agreement. The Respondent will provide the name, location and telephone number of the Respondent's representative. The Commission's Staff Investigator will serve as the Commission's representative for purposes of the administration of this Agreement.

3. The execution and implementation of this Agreement shall have no effect upon the handling or disposition of any other complaints of discrimination filed with the Federal Government or the Commission nor before any other tribunal: federal, state, local or private, except that the Respondent may in the course of any proceedings, refer to this Agreement and to their performance thereunder, to the extent that it is relevant to such proceedings.

4. The Commission may review compliance with the provisions of the Agreement. The review will consist of but not be limited to an examination of the reports submitted to the Commission in accordance with the terms of this Agreement. The Respondent agrees to make available additional information as may be necessary for an adequate review. Upon noncompliance with the terms of this Agreement, the Commission will send a letter of such noncompliance to the Respondent and indicate the precise steps necessary to correct said violations of the Agreement. Thereafter, the Respondent shall have ten (10) days in which to comply with the direction to correct violations and to so notify the Commission. If, at the conclusion of this period, the violations have not been corrected, the Commission may take appropriate action, including the institution of judicial proceedings, to secure compliance with the Agreement.

5. The Respondent agrees that all of its housing and/or rental practices within the State of Maryland, including all sales, rentals, construction and management practices and all other terms, conditions, and privileges of sales, rentals or services shall be maintained and conducted in a manner which does not disctiminate on the basis of race, color, sex, religion, national origin, marital status, or physical or mental handicap in violation of Article 49B of the Annotated Code of Maryland.

6. The Respondent agrees not to engage in any conduct against the Complainant or any party to or participant in these proceedings the nature of which might be construed as retaliatory.

7. The Complainant hereby waives, releases and covenants not to sue or prosecute further charges against the Respondent with respect to any matters which were or might have been alleged as charges filed with the Commission in the instant case, subject to performance by the Respondent of the promises and representations contained herein. The Commission shall determine whether the Respondent has complied with the terms of this Agreement.

8. The Complainant agrees to withdraw the complaint filed with this Commission and the Department of Housing and Urban Development against the Respondent.

9. The parties agree that this Agreement is not confidential and that the attached press release may be issued by the Commission.

10. The Respondent agrees that all advertisements and printed materials will comply with Article 49B of the Annotated Code of Maryland.

11. The Respondent agrees to immediately comply with Section 804(c) of Title VIII and Federal Fair Housing Advertising Regulations regarding the use of the equal housing slogan and/or logo in any and all of its advertisements and printed materials. The Respondent will within thirty (30) days of the execution of this Agreement modify all current advertisements and materials printed for public distribution to include the equal housing opportunity slogan and/or logo as prescribed by the referenced "regulations."

12. The Respondent agrees that if advertisements are placed in local/ Community newspaper(s) which reach a predominantly White population, the Respondent will place an advertisement of equal content in a minority newspaper.

13. Respondent agrees that the Commission's staff and the staff of Baltimore Neighborhoods Incorporated shall provide training regarding advertising to all personnel responsible for advertising Respondent's business. Respondent agrees to identify persons who will attend the training by name, title, telephone number, and address. An appropriate time and place for the training shall be determined by the parties.

14. The Respondent agrees to contribute $500.00 to Baltimore Neighborhoods, Inc. to assist BNI in its fair housing efforts and to support BNI's involvement in provisions #13 and #15 of this Agreement.

REPORTING

15. The Respondent agrees that thirty (30) days after the execution of this Agreement and after each ninety (90) day period thereafter for the length of this Agreement, the Respondent will provide copies of all advertisements to Mr. Don Miller, Baltimore Neighborhoods, Inc. Baltimore Neighborhoods, Inc. will notify the Commission of any advertisements which may be in violation of the terms of this Agreement.

This Agreement is limited in its application to the Respondent's activities in the State of Maryland and is hereby agreed to by the parties and is ordered by the Commission.

IN WITNESS WHEREOF, all parties and the Commission have set their hands and seal this _____ day of _____, 1983.

_____
Complainant

_____
Respondent

_____
Title

_____
Executive Director
MARYLAND COMMISSION ON HUMAN RELATIONS

_____
Chairman
MARYLAND COMMISSION ON HUMAN RELATIONS

Approved by:

_____
Lydell Scott
Intergroup Relations Representative

Date: _____

_____
Eric P. Johnson
Director, Housing Division

Date: _____

LS/cbc

UNITED STATES PUBLIC LAW 90-284
Civil Rights Act of 1968
Title VIII - Fair Housing (Excerpt)

DISCRIMINATION IN THE SALE OR RENTAL OF HOUSING

Section 804: It shall be unlawful -

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color religion sex or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex of national origin.

(c) To make, print, or publish, or cause to be made, printed or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular, race, color, religion, sex or national origin.

DISCRIMINATION IN THE FINANCING OF HOUSING

Section 805:

After December 31, 1968, it shall be unlawful for any bank, building and loan association, insurance company or other corporation, association, firm or enterprise whose business consists in whole or in part in the making of commercial real estate loans, to deny a loan or other financial assistance to a person applying therefor for the purpose of purchasing, construction, improving, repairing, or maintaining a dwelling, or to discriminate against him in the fixing of the amount interest rate, duration, or other terms or conditions of such loan or other financial assistance, because of the race, color, religion, sex, or national origin of such persons or of any person associated with him in connection with such loan or other financial assistance or the purposes of such loan or other financial assistance, or of the present or prospective owners, lessees, tenants, or occupants of the dwelling or dwellings in relation to which such loan or other financial assistance is to be made or given.

DISCRIMINATION IN THE PROVISION OF BROKERAGE SERVICES

Section 806:

After December 31, 1968, it shall be unlawful to deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation, on account of race, color, religion, sex, or national origin.

Senator METZENBAUM. Thank you very much.

Mr. HALL. Thank you, Senator.

Senator METZENBAUM. Mr. Raynolds, president-elect of the Illinois Association of Realtors.

Mr. RAYNOLDS. Thank you very much.

Senator METZENBAUM. If you could summarize your testimony, it would be helpful. There is a rollcall that has just been called, but I do not want to deprive you; if you prefer to read part of it, that would be all right.

Mr. RAYNOLDS. It might be quicker and easier for me to read from it than to try to summarize it, so I will go very quickly.

Senator METZENBAUM. Let me ask you a question. I notice that you and Mr. Hall and Mr. Pearson, that all of your material seem to have been prepared by the same person or group. Is this sort of a concerted effort that is reflected here? You have a right to do that, but if——

Mr. RAYNOLDS. I can only speak for myself. I prepared this after over 8 years of being involved in this business and I had no prior speaking or knowledge of what their testimony was at all.

Senator METZENBAUM. I guess maybe it is the same typewriter. Maybe all realtors use the same real estate group typewriter.

Mr. RAYNOLDS. It was typed, mine and Mr. Pearson's were typed in the same place.

Mr. HALL. Senator, mine was typed on my word processor in Baltimore.

Senator METZENBAUM. Go ahead.

STATEMENT OF RANDALL RAYNOLDS

Mr. RAYNOLDS. Thank you. Let me state that I am Randall Raynolds, from Springfield, and I have been around since 1972 and my previous experience in this field was chairing the National Association's Equal Opportunity and Integration Maintenance Task Force Committee. Also, I have been a member of the negotiating team with HUD for the past five years and worked with that team in negotiating the FHIP agreement just this past year.

Presently and since 1980, I also serve as a Commissioner, on the Illinois Human Rights Commission for the Governor of Illinois.

I appreciate the opportunity to address you today on the items related to this Fair Housing Act. My statements relating to those provisions on "Housing Opportunities for Families with Children" and on "Handicap" concur with those that were previously given to you by Bob Butters.

The concern that I bring you today is that of the realtors seeking definition and clarification of the previous fair housing laws, so we can practice our profession free and clear of the threat of inadvertent discrimination or violations of the law of the land.

I would hope that my testimony will encourage you to take this opportunity to give such definition and clarification in your Fair Housing Act. The policies, bylaws and professional standards of the NAR advocate freedom of choice and total open housing. However, in Illinois, as in many other States, including Ohio, we are mandated by the laws of numerous villages to practice the policies of some-

thing quite less than ours, and that is programs called integration maintenance.

Integration maintenance programs are governmental efforts to stabilize integrated neighborhoods and villages. They grow from a fear that some areas will become all black or resegregated. Generally, these are ones which were initial advocates of open housing and had become integrated while their neighboring villages made it more difficult for minority inflow. These villages then adopted ordinances, programs, or housing centers which are designed to create and maintain a stable interracial balance through benign steering or quota systems.

The fear in these villages is that they may reach the "tipping" point. That is the time when the perception of the percentage of blacks within one neighborhood becomes so great as to cause a decline in property values and ultimate resegregation as an all black community.

This philosophy of balanced integration has been determined successful by integration maintenance proponents, because it allows an acceptable number of minorities to live within one area without the fear of white flight. For those of us who have never known rejection of free choice in housing, the racially balanced system answers the desires for safety and stable housing values by controlling the inflow of the minorities. The success of these programs is at the expense of the civil rights of minorities because it is based on the management and distribution of the population solely by race and limiting the numbers of minorities to that acceptable level determined by the white population.

In my written report that I have given you are listed further policies that are used to maintain these types of programs and I will skip that part of my report and leave that to Mr. Pearson, and just mention that a definition of fair housing to mean open housing and freedom of choice, allowing and insuring that people who have the ability to purchase or rent may do so whenever they so choose is needed in this act. To continue to allow the categorization of a race as being detrimental to society or to the health, safety, and welfare of a community when allowed to openly populate is blatantly discriminatory.

I would like at this time to turn in my comments to the fines, enforcement and judicial areas in the proposed legislation. I do not take tremendous exception to the amount of fines, although they are large enough to put most real estate firms and individuals out of business or at least in very dire financial straits.

I would only reiterate that this further necessitates you to give our industry the definition of "fair housing," so we have no excuses for violating the Federal laws and at the same time are not presumed by the multitude of local ordinances to adhere to them in direct violation of open housing.

The vulnerability of our industry to the goals of local and Federal testing groups has forced us into a lawsuit paramour. Often, our industry is forced to settle or conciliate threatened lawsuits for minimal amounts, not because of apparent guilt but because of the crippling costs of legal defense and judicial service. If we all worked under one law explicitly defined, then the innocent would

ally with the concerned groups and share the prosecution of the guilty.

Concerning the feasibility of administrative law judges at the Federal level, I offer the following: The Illinois Human Rights Act of 1980 set up an ALJ system which has worked well to expedite discrimination charges in a timely fashion. It is a three-tier system with the Department of Human Rights as investigator, ALJs as judge and the Illinois Human Rights Commission has final review of all decisions.

All parties have full rights to obtain judicial review of decisions under the Administrative Review Act. The budget for this department in 1987 approaches $2 million. This leads me to believe a Federal system to handle 50 States would be very costly and not as timely as systems already in force.

As far as the ALJ, I believe his purpose is to adjudicate and not to act on behalf of the complainant in filing charges. This would mean his appointment or employment should not be by the body responsible for the advocacy side of the law.

In civil damage cases, I feel that either the party should not be precluded from their due process allowed by Federal courts. The severity of the charges and damages possibly awarded demands this. To give a complainant 1 year from alleged act of discrimination to file a charge is heavily weighted to the complainant's side. We have found in Illinois that 180 days is the most fair to all parties.

I would also caution that because of the involvement of legal counsel and their legal procedures, some of the time-tables you have set for trying the cases may be too short. We have found most housing cases have been settled within 120 days, but those that are not will run up to 300 days. The final concern I have is that the role of the Secretary should be one of investigator or prosecutor, not one of judge or jury.

I thank you for your considerations and also the opportunity to present my views to this subcommittee.

[The prepared statement of Mr. Raynolds follows:]

TESTIMONY BEFORE U.S. SENATE SUBCOMMITTEE ON THE CONSTITUTION

April 2, 1987

Randall Raynolds

President-Elect

Illinois Association of REALTORS®

I am Randall Raynolds from Springfield, Illinois. I have been a REALTOR® since 1972 and am currently President-Elect of the Illinois Association of REALTORS®. I serve as a director to the NATIONAL ASSOCIATION OF REALTORS® and am past chairman of the National Equal Opportunity and Integration Maintenance Task Force Committees. I was part of the NAR team which negotiated the 1986 HUD/NAR FHIP agreement. I have served as a commissioner on the Illinois Human Rights Commission since 1980.

I appreciate the opportunity to address you today on items relating to the Fair Housing Amendments Act of 1987. My statements relating to those provisions on "Housing Opportunities for Families with Children" and on "Handicap" concur with those of the NAR as presented by Robert Butters. The concern that I bring you today is that of the REALTOR® who is seeking definition and clarification of the previous fair housing laws, so we can practice our profession free and clear of the threat of inadvertent descrimination or violations of the law of the land. I would hope that my testimony will encourage you to take this opportunity to give such definition and clarification to the term "fair housing" in the 1987 act. The policies, by-laws and professional standards of the NAR advocate freedom of choice and total open housing. However, in Illinois as in many other states, we are mandated by the laws of numerous villages to practice the policies of

something quite less than ours, that of programs called integration maintenance.

Integration Maintenance Programs are governmental efforts to stabalize integrated neighborhoods and villages. They grow from a fear that some areas will become all black or resegregate. Generally, these areas are ones which were initial advocates of open housing and had become integrated while their neighboring villages made it more difficult for minority inflow. These villages then adopted ordinances, programs, or housing centers which are designed to create and maintain a stable interacial balance through benign steering or quota systems. The fear of these villages is that they may reach the "tipping" point. That is the time when the perception of the percentage of blacks within one neighborhood becomes so great as to cause a decline in property values and ultimate resegregation as an all black community. This philosophy of balanced integration has been determined "successful" by integration maintenance proponents, because it allows an acceptable number of minorities to live within one area without the fear of "white flight". For those of us who have never known rejection of free choice in housing, the racially balanced system answers the desires for safety and stable housing values by controlling the inflow of the minorities. The success of these programs is at the expense of the civil rights of minorities because it is based on the management and distribution of the population solely by race and limiting the numbers of minorities to that acceptable level determined by the white population.

Some of the programs which are contrary to our understanding of federal fair housing laws and are used to implement integration maintenance are: (a)the prohibition on "for sale" and "for rent" signs (b)anti-solicitation ordinances and (c)steering policies of village groups which through counseling, escorting, monitoring the traffic of buyers and sellers, and the use of "preferred" brokers lists allows these groups to encourage white buyers and discourage or steer black buyers to neighboring communities. While the intentions of these groups are palatable to those allowed to live within these villages and have "stabilized" these areas, they have given tremendous ambiguity to the intent and definition of the federal fair housing laws. In

doing so, they have put the real estate practitioners who advocate open housing and freedom of choice in the position of violating local ordinances and subsequent business-destroying litigation, while trying to obey the federal laws. All too often our industry in these large metropolitan areas is faced with lawsuits initiated from steering charges brought by one village while apparently working legally within the ordinances of the neighboring villages.

A definition of fair housing to mean open housing and freedom of choice, allowing and insuring that peoople who have the ability to purchase or rent may do so whenever they so choose is needed in this Act. To continue to allow the categorization of a race as being detrimental to society or the health, safety and welfare of a community when allowed to openly populate is blatantly discriminatory.

Turning to the fines, enforcement and judicial areas in the proposed legislation I have the following comments. I don't take tremendous exception to the amount of the fines though they are large enough to put most real estate firms and individuals out of business or endure financial straits. I would only reiterate the necessity for our industry to know the definition of "fair housing" so we have no excuses for violating the federal laws and at the same time aren't pressured by the multitude of local ordinances to adhere to them in direct violation of open housing. The vulnerability of our industry to the goals of local and federal testing groups has forced us into a lawsuit paranoia. Often our industry is forced to settle or conciliate threatened lawsuits for minimal amounts not because of apparent guilt but because of the crippling costs of legal defense and judicial service. If we all worked under one law explicitly defined then the innocent would ally with concerned groups to ensure the prosecution of the guilty.

Concerning the feasibility of Administrative Law judges at the federal level I offer the following. The Illinois Human Rights Act of 1980 set up an ALJ system which has worked well to expedite discrimination charges in a timely fashion. It is a three-tier system with the Department of Human Rights as investigator, ALJs as judge and the Illinois Human Rights Commission has final review of all decisions. All parties have full rights to ob- n

judicial review of decisions under the Administrative Review Act. The budget for this department in 1987 approaches two million dollars. This leads me to believe a federal system to handle fifty state would be very costly and not as timely as systems already in force.

As far as the ALJ I believe his purpose is to adjudicate and not to act on the behalf of the complainant in filing charges. This would mean his appointment or employment shouldn't be by the body responsible for the advocacy side of the law.

In civil damages cases, I feel that either party should not be precluded from their due process allowed by federal courts. The severity of the charges and damages awarded demands this. To give a complainant one year from alleged act of discrimination to file a charge is heavily weighted to the complainants side. We have found 180 day to be most fair to all parties. I would also caution that because of the involvement of legal counsel and their legal procedures, some of the time tables you have set for trying the cases may be too short. We have found most housing cases have been settled within 120 days, but those that aren't will run up to 300 days. The final concern I have is that the role of the Secretary should be one of investigator or prosecutor, not one of judge or jury.

I thank you for your considerations and the opportunity to present my views to the Subcommittee.

Senator SIMON [presiding]. I thank you and I am sorry I was not here to introduce a witness from Illinois. I am very pleased to have you here.

Because there is a vote on, I know Senator Specter may want to get a word or two in here before he goes over for the vote.

Senator SPECTER. Thank you very much, Mr. Chairman. I am sorry to have been late here. We have had a rather hectic time with the highway bill, as I think you know.

I have heard some reference to the issue of the administrative law judge matter and I would be interested among the panelists to know whether you prefer the administrative law judge as opposed to the arbitration procedure. What is your view on that?

Mr. PEARSON. I do not have any comments on that. I would say that Randy could probably answer that a little better than I can.

Mr. RAYNOLDS. I am not fully aware of what the procedure is in the arbitrator position, but I know that, being a commissioner on the Illinois Human Rights Commission, where we employ six administrative law judges and we hear some 4,000 cases a year and settle about 400 of them, if the idea is to expedite the charges and bring satisfaction to the complainants, then I think that the arbitrator would definitely have to be a better case than what an administrative law judge would do.

Mr. HALL. Senator, I might add that as far as the real estate industry is concerned, because of the professional standards and ethics programs already in place in connection with the Code of Ethics of the National Association of Realtors, that an arbitration procedure is generally viewed much more favorably within the real estate industry. It has worked, it has kept many of our problems out of the courts, it has been less costly, and by and large more effective without the expenditure of additional money and time.

Senator SPECTER. Thank you very much. They have just rung five bells, so I have to go to the floor to vote. I am sorry I could not have been here for the balance of your testimony, but I have had my staff present and I will review the record.

Thank you, Mr. Chairman.

Senator SIMON. Thank you, Senator Specter.

Now, Mr. Alvin Pearson. I will get to introduce one Illinois citizen here. He is with the Greater South Suburban Board of Realtors of the Chicago Area.

Mr. Pearson.

STATEMENT OF ALVIN PEARSON

Mr. PEARSON. Mr. Chairman, my name is Alvin Pearson. I am president of the Greater South Suburban Board of Realtors, Chicago Metro Area. Our service area includes 36 communities, which probably has the highest concentration of integration maintenance programs in the United States.

It is a privilege to have this opportunity to address your subcommittee on the subject of integration maintenance.

Shortly after blacks began to make non-traditional moves to white south suburban communities, a number of the aforementioned communities adopted or considered integration maintenance plans, programs with a goal to limit or channel black entry. Al-

though the purpose of integration maintenance is to promote integration, its effect is to undermine the proscriptions for fair housing laws.

"Tipping" is a term that describes the exit of white families when the black population exceeds a critical "tipping point," resulting in a resegregated neighborhood. Tipping is a vicious circle of fear, the more it occurs the more it will be expected, and the more it is expected the more it will occur.

The integration maintenance concept grew out of the theory of tipping. Proponents believed that by limiting the number of blacks allowed into an integrated area to a percentage below the tipping point, integration would be preserved.

All integration maintenance programs include the following three essential characteristics:

They treat prospective entrants in a community differently on a racially selective basis; their objective is the avoidance of white flight; and they intend to some degree to discourage black entry.

Integration maintenance has the tendency to undervalue the individual freedoms that minority group members are asked to sacrifice in the implementation of integration maintenance plans. Integration maintenance does not depend on the consent of blacks, individually or as a group. White communities impose integration maintenance in order to prevent the community from becoming black.

In the practical world of the average real estate agent, the norms of behavior that title VIII mandates are incompatible with the conduct that integration maintenance requires. For this reason——

Senator SIMON. May I interrupt you just for a moment, Mr. Pearson. I have a phone call that I have to make immediately and, if I could, I will just recess for 5 minutes and I will be right back.

[Short recess.]

Senator SIMON. The subcommittee will resume.

We are going to have to stick very strictly to the 5-minute rule, because I have to leave at 4:30 for the airport.

Mr. Pearson, if you can finish and finish as rapidly as possible, and then I will call on the others.

Mr. PEARSON. Yes, sir.

As indicated, all integration maintenance programs include the following three essential characteristics: They treat prospective entrants in a community differently on a racially selective basis; their objective is the avoidance of white flight; and they attempt to some degree to discourage black entry.

The central characteristic common to all integration maintenance plans is the use of differential racial treatment to prevent white flight.

Integration maintenance has the tendency to undervalue the individual freedom of minority group members are asked to sacrifice in the implementation of integration maintenance plans.

Integration maintenance does not depend on the consent of blacks, individually or as a group. White communities impose integration maintenance in order to prevent the community from becoming black.

Translated into real-world conduct, integration maintenance requires race-conscious behavior, but title VIII forbids it, and there is

a serious danger that the unintended effect of integration maintenance is to cause theoretically benign race-conscious behavior to spill over into situations where the race-conscious is in fact not benign.

In the practical world of the average real estate agent, the norms of behavior that title VIII mandates are incompatible with the conduct that integration maintenance requires. For this reason alone, integration maintenance should not be permitted.

The types of integration maintenance programs that have been implemented in the Greater South Suburban Board of Realtors marketing area are as follows:

Requiring notification of intent to sell, the requirement that potential sellers or their agents notify municipal government of their intent to sell. This requirement provides the bureaucracy with the more complete set of listings than would be available to a multiple listing service.

Requiring brokers to file affirmative marketing plans. The required affirmative marketing plans detail how brokers are to steer whites to underrepresented areas. This appears to put brokers in violation of title VIII, which is also contrary to the affirmative marketing agreement between HUD and the National Association of Realtors.

Senator SIMON. If you could conclude quickly here.

Mr. PEARSON. OK.

Counseling potential buyers: Counseling which consists of guiding or steering potential buyers to specific listing, prohibiting broker solicitation, anti-solicitation laws make it a criminal offense for a broker to solicit a homeowner who has signed a list; prohibiting for sale signs, a ban of for sale signs has been used in various south suburban communities.

Equity assurance plans: In order to maintain integration, some proponents have argued for insuring against the capital some whites imagine are associated with racial transitions.

Testing and suing brokers for racial steering: As an element of integration maintenance programs, some municipalities have been testing and suing brokers for racial steering.

Last but not least, quotas: The argument for quotas is that there is a tipping point beyond which the subdivision re-segregates. University Park had a quota of 20 percent black. This quota was unique, because at the time it was proposed there was a 25 percent black population in University Park.

It is unlikely that integration maintenance programs will be successful in actually maintaining integration; however, they are likely to do a number of other things.

For example, there are psychological costs to be borne by blacks as they must face and overcome government imposed barriers to entry. The cost of government will rise as government services displace private brokerage services. The housing market will be made less efficient and as a result less information, thus the primary effects of integration maintenance programs are unrelated to maintaining integration.

Thank you for the opportunity to provide this testimony to your subcommittee.

[The prepared statement of Mr. Pearson follows:]

STATEMENT OF ALVIN PEARSON

PRESIDENT

GREATER SOUTH SUBURBAN BOARD OF REALTORS

Mr. Chairman, my name is Alvin Pearson. I am President of The Greater South Suburban Board of REALTORS® (Chicago Metro Area). Our board currently has a membership of over 1200 REALTORS®. Our service area includes 36 communities which probably has the highest concentration of integration maintenance programs in the United States.

It is a privilege to have this opportunity to address your subcommittee on the subject of "Integration Maintenance". It is my intent to discuss issues concerning members of my local board, the Illinois Association of REALTORS® and the NATIONAL ASSOCIATION OF REALTORS®.

Shortly after blacks began to make non-traditional moves to white South Suburban Communities, a number of the aforementioned communities adopted or considered "Integration-Maintenance" Plans, programs with a goal to limit or channel black entry. Although the purpose of Integration Maintenance is to promote "Integration" its effect is to undermine the proscriptions for fair housing laws.

"Tipping" is a term that describs the exit of white families when the black population exceeds a critical "Tipping Point", resulting in a resegrated neighborhood. Tipping is a vicious circle of fear, the more it occurs the more it will be expected, and the more it is expected the more it will occur.

The integration maintenance concept grew out of the theory of tipping. Proponets believed that by limiting the number of blacks allowed into an integrated area to a percentage below the tipping point, integration would be preserved.

Three Examples Of Integration Maintenance Programs

1. The village of Oak Park, Illinois considered in 1974 the adoption of an ordinance which included the following:

   It shall be unlawful for any seller or any agent to knowingly sell any real property to a black person on any block in the designated area if 30% or more of the block between two intersecting streets on both sides of the street has been occupied by black persons. The Oak Park Board of Trustees

rejected the ordiance by a vote of eight to seven.

2. In 1977 University Park, Illinois passed an ordiance that required real estate brokers to develop "Affirmative Marketing Plans" to encourage the entry of racial groups that were underrepresented in the community as compared to that groups representation in the Chicago-Metropolitan area. When University Park passed the ordinance, blacks constituted 25% of the population of the suburb, but accounted for only 20% of the Chicago Metropolitan area population. University Park rescinded the ordinance when our local board of REALTORS® filed a complaint with HUD.
3. In Shaker Heights, Ohio the housing office of Shaker Heights attempted to influence home seekers to make non-traditional moves.

All integration maintanance programs include the followings three essential characterists:

1. They treat prospective entrants in a community differently on a racially selective basis.
2. Their objective is the avoidance of white flight.
3. They attend to some degree to discourage black entry.

The central characteristic common to all integration maintenance plans is the use of differential racial treatment to prevent white flight.

Integration maintenance has the tendency to undervalue the individuals freedoms that minority group members are asked to sacrafice in the implementation of integration maintenance plans.

Integration maintenance does not depend on the consent of blacks, individually or as a group. White communities impose integration maintenance in order to prevent the community from becoming black.

Translated into real-world conduct, integration maintenance requires race-conscious behavior, but Title VIII forbides it, and there is a serious danger that the unintended efect of integration maintenance is to cause theoretically benign race-conscious behavior to spill over into situations where the race-conscious is in fact not benign.

In the practical world of the average real estate agent, the norms of behavior that Title VIII mandates are incompatible with the conduct that

integration maintenance requires. For this reason alone integration maintenance should not be permitted.

The types of integration maintenance programs that have been implemented in the Greater South Suburban Board of REALTORS® Marketing Area are as follows:

1. The requirement that potential sellers or their agents notify Municipal Government of their intent-to-sell, provides the bureaucracy with a more complete set of listings than would be available to a multiple listing service.
2. The required "Affirmative Marketing" plans detail how brokers are to steer whites to underrepresented areas. This appears to put brokers in violation of Title VIII which is also contrary to the Affirmative Marketing Agreement between HUD and the NATIONAL ASSOCIATION OF REALTORS®.
3. Counseling which consists of guiding (steering?) potential buyers to specific listing, subdivisions, or municipalities for the purpose of stabilizing integration where it exists and creating it where it does not exist. Brokers are expected to send their potential buyers to be counseled. After providing the potential buyer with racially differented guidance, the counselor refers them to an "Affirmative Marketing" broker. If the broker had provided the same kind of guidance, he or she would have violated Title VIII.
4. Anti-solicitation laws make it a criminal offense for a broker to solicit a Homeowner who has signed a list provided by his local government. The constitutionality of anti-solicitation laws are presently being challenged in the federal court system.
5. A ban on "For Sale" signs have been used in various South Suburban communities. The purpose of this restriction can only be to cause certain potential market participants to be uninformed of market activity. For sale sign bans have been declared unconstitutional.
6. The logic of the entire system of local controls on brokers to maintain integration rests on the government buraucracy keeping detailed data on race. Some proponets on integration maintenance programs believe that they must monitor traffic, sales and residence by race. The greatest

problem is that the data are and will continue to be used for discriminatory purposes.

7. In order to maintain integration some proponets have argued for insuring against the capital some whites imagine are associated with racial transitions. Equity Assurance Plans insure against 80% of capital loss. The existence of this type of insurance may actually create the kind of expectations it seeks to dispel.

8. As an element of integration maintenance programs some municipalities have been testing and suing brokers for racial steering. Brokers tend to object to testing on the basis that they are misled concerning the true intentions of testers. They also spend time and other valuable resources on the testers and are not compensated.

9. Quotas are explicit maximum percentages of various groups. The argument for quotas is that there is a tipping point beyond which the subdivision resegregates. University Park had a quota of 20% black. This quota was unique because at the time it was proposed there was a 25% black population in University Park.

It is unlikely that integration maintenance programs will be successful in actually maintaining integration, however, they are likely to do a number of other things.

For example there are psychological costs to be borne by blacks as they must face and overcome government imposed barriers to entry. The cost of government will rise as government services displace private brokerage services. The Housing Market will be made less efficient as a result of less information thus, the primary effects of integration maintenance programs are unrelated to maintaining integration.

Thank you for the opportunity to provide this testimony to the Subcommittee.

Senator SIMON. I thank you, Mr. Pearson.

Jacqueline Simon, a person with an unusually fine last name. We are pleased to have you.

Ms. SIMON. Thank you, sir. I am glad you recognize that.

Senator SIMON. We are glad to have you as a witness here.

STATEMENT OF JACQUELINE SIMON

Ms. SIMON. Thank you. I am Jackie Simon, and I have been a realtor since 1978, in Montgomery County, MD. I am a member of the Maryland Association of Realtors, the Montgomery County Board of Realtors, and the National Association of Realtors.

Since 1978, I have sold in excess of 65 million dollars' worth of residential property, the bulk of which has been priced less than $115,000. In 1980, I was the top ERA agent in the Nation from among 40,000 agents, and I have been among their top 100 associates in 5 of the last 6 years.

I serve as the vice chairman of the Maryland Housing Policy Commission, a body appointed by the Governor to advise the Governor and the legislature on Maryland housing policy. I have served as president of the Montgomery County Chamber of Commerce and Suburban Maryland Fair Housing.

In addition, I was an incorporator of the Community Housing Resource Board, the group that monitors the Voluntary Affirmative Marketing Agreements (VAMA) between HUD and the local board of realtors, and a member of my Board's Equal Opportunity In Housing Committee, until I was asked to remove myself from these two groups under the 1981 amendments to the Voluntary Affirmative Marketing Agreement. This amendment requires my removal from these groups because I was a party to a housing discrimination suit. How ironic that is, since I was a plaintiff in that case, not a defendant.

It is from my experiences as a human relations commissioner, a fair housing advocate, the plaintiff in a housing discrimination suit, and a realtor that I testify today.

This legislation in all of its aspects, in my professional opinion, is long overdue and essential. Families with children need protected class status. It is my experience that denial of housing on the grounds of the presence of children is frequently only thinly veiled racial, religious, or ethnic discrimination.

In some market areas, more than 50 percent of the rental units are off the market to families with children. The effect of the adults-only policy is racially discriminatory. Testing is essential—not just testing in response to a complaint, but random testing is essential. Testing is the only way to discover the more covert forms of discrimination that occur today.

Many times a victim does not even know he has been victimized. "Then who is harmed?" one asks. We are all harmed by the acts of others that arbitrarily or maliciously segregate us.

For example, in a recent test in the Washington metropolitan area, a black tester was told by a rental agent "there are no vacancies," in the presence of a white tester on her way to view two available apartments. Different amounts are quoted for security deposits. White testers are told of free carpets or microwaves, while

black testers are not. Interest rate, amount down, or the sale price is higher to the black tester than the white tester.

Deny it as we may, as the broker between buyer and seller, we are frequently asked to become instruments for the discriminatory purposes of others. This becomes a minefield for us to negotiate, but to constrain testing, and thereby increase the burden of the victims of discrimination and to conceal the occurrence of discrimination, is not an appropriate response. Constraints on testing initiated by the NAR, make realtors part of the problem, not part of the solution.

Those of us who conduct ourselves in a professional, ethical way have nothing to fear from testing. I acknowledge that it takes time, but I submit that the cost is an appropriate price to pay, to reduce discriminatory practices. I see it as no different than auditors from the Real Estate Commission coming to audit our escrow accounts. It is simply a cost of doing business.

I vehemently disagree with NAR's position that testing is a means of extortion. Realtors who discriminate should feel the full force of the law. NAR protests too much regarding testing.

The proposed use of the administrative law judge system, as an alternative to litigation, is also essential. As the plaintiff in a housing discrimination suit, I have experienced the time, the expense and the emotional toll that housing discrimination suits exact. I went into that case much more aware of the magnitude of the undertaking than most victims have. In spite of that knowledge, nothing prepared me for the pressures, the time, and the anxiety I was to experience. A less onerous setting, a more timely settlement, and an opportunity for less expensive resolution of housing discrimination complaints is absolutely necessary, or the victim becomes victimized again, this time by the very system intended to protect.

Those who make a profound difference are those who attempt to challenge those things we view as immutable, and those who stand for something. It is my experience that there are many in the real estate profession who seek to make a profound difference.

The position of NAR on testing and the use of administrative law judges is an embarrassment. It is an embarrassment because it seeks to protect us, the realtors, at the expense of the interests of many of the very customers and clients we seek to professionally serve.

The obligation of a professional is to hold one's self fully accountable for compliance with the letter and the spirit of the law, not seeking to form the law to our convenience or for our self-serving protection, as our national association is seeking to do.

In these times of increased hate and violence, in these times of absence of leadership in civil rights, in these times of significant and all-too frequent acts of housing discrimination, the victims and those yet to become victims require this legislation. They require protection from discrimination because of the presence of children, they require the use of testing and random testing, they require an opportunity for speedy, affordable resolution.

Senator SIMON. If you would conclude, please.

Ms. SIMON. I submit, that their needs are paramount. Thank you. [Applause.]

Senator SIMON. As much as I would ordinarily appreciate applause for a "Simon," we will have to maintain the rules of the Senate here. [Laughter.]

[The prepared statement of Ms. Simon follows:]

78-076 0 - 88 - 11

STATEMENT OF JACKIE SIMON, REALTOR®

BEFORE THE

SENATE JUDICIARY COMMITTEE ON THE CONSTITUTION

APRIL 2, 1987

Mr. Chairman, Members of the Committee

I am Jackie Simon. I have been a REALTOR® with Mimi Selig Homes, Inc., in Rockville, Maryland, since 1978. I am a member of the Montgomery County Board of REALTORS®, the Maryland Association of REALTORS®, and the National Association of REALTORS®. Since 1978 I've sold in excess of $65,000,000 worth of residential properties. Most of these transactions were priced below $115,000. In 1980, I was the top ERA (Electronics Realty Associates) Agent in the nation, from among 40,000 agents. I have been among the Top 100 ERA Agents, 5 of the last 6 years.

I serve as the Vice-Chairman of the Maryland Housing Policy Commission-a body appointed by Governor of Maryland to advise the Governor and the Legislature on Housing Policy for the State. I have served as President of the Montgomery County Chamber of Commerce, and as President of Suburban Maryland Fair Housing, a 25 year old fair housing organization. I have been a member of the Human Relations Commission of Montgomery County.

In addition, I was an Incorporator of the CHRB (Community Housing Resources Board-the group that monitors the Voluntary Affirmative Marketing Agreement) and a member of the MCBR Equal Opportunity in Housing Committee, until I was asked to remove myself from these 2 groups under the 1981 amendment to the Voluntary Affirmative Marketing Agreement. ("Any party to litigation or complaints alleging violations of the Federal Fair Housing Law or the REALTORS® Code of Ethics, as from time-to-time amended, shall immediately withdraw as a member of the Member Board Equal Opportunity Committee or as a member of the CHRB. When the litigation or complaint is resolved, appointment and service on the Equal Opportunity Committee or CHRB may be reinstated.") This amendment required my removal from these groups because I was a "party" to a housing discrimination suit. How ironic that is, since I was a PLAINTIFF in that case-not a defendant!

It is from my experiences as Human Relations Commissioner, a fair housing advocate, the Plaintiff in a housing discrimination suit in the United States District

Court for the District of Maryland, and as a REALTOR® I testify today.

The legislation under consideration is both essential and long overdue in all of its aspects, in my view.

Families with Children NEED "protected class" status. It is my experience that denial of housing on the grounds of the "presence of children" is frequently, only thinly veiled racial, religious or ethnic discrimination. In some market areas, 50% of the rental units are off limits to families with children. This has the effect of increasing demand for a reduced supply which drives housing costs up. Since minority families are more likely to rent than white families, the effect of "adult-only" policies is racially discriminatory.

Testing is Essential. -Not just testing in response to a complaint, but RANDOM testing. Testing is the ONLY way to discover the more covert forms of discrimination that occur today. Many times a victim does not know he or she has been victimized. "Then who is harmed?" you ask. We are all harmed by acts of others, that arbitrarily or maliciously segregate us. For example, in a recent test in the Washington Metropolitan area, a black tester was told by the rental agent "There are no vacancies" in the presence of a white tester on her way to view 2 available apartments. Differing amounts are quoted for security deposits. White testers are told of free carpet or microwaves while black testers are not! The interest rate, the amount down, or the sale price is higher for the black tester than the white tester.

Deny it as we may, as the broker between buyer and seller, we are frequently asked to become instruments for the discriminatory purposes of others. This becomes a "minefield" for us to negotiate, but to constrain testing and increase the burden of the victims of discrimination is not an appropriate response. Constraints on testing make REALTORS part of the problem, not part of the solution.

Those of us who conduct ourselves in a professional, ethical way have nothing to fear from testing. I acknowledge testing does consume an agent's time, but I believe that that cost is an appropriate price to pay to reduce discriminatory practices. I venemently disagree with NAR's position that testing is a means of "extortion". REALTORS® who discriminate should feel the full force of the law. NAR protests too much regarding testing.

The proposed use of an Administrative Law Judge System, as an alternative to litigation, is also essential.

As a Plaintiff, in a housing discrimination suit, I

nave experienced the time, the expense, and emotional toll that housing discrimination suits exact---and, I went into the case much more aware of the magnitude of the undertaking than most victims have. In spite of that knowledge, nothing prepared me for the pressure, the time, and the anxiety I was to experience. A less onerous setting, a more timely settlement, and an opportunity for less expensive resolution of housing discrimination complaints is absolutely necessary, or...the victim is victimized again-this time, by the very system intended to protect.

Those who make a PROFOUND DIFFERENCE are "those who attempt to challenge those things we view as immutable" and "those who stand for something." It is my experience that there are many in the real estate profession who seek to make a profound difference. The position of the NAR on testing, and the use of Administrative Law Judges are an embarrassment. It is an embarrassment, because it seeks to protect us, the REALTORS®, at the expense of the interests of many of the very customers and clients we seek to serve.

The obligation of a professional is to hold oneself fully accountable for compliance with the <u>letter</u> and the <u>spirit</u> of the law-not seeking to form the law to our convenience or for our protection, as our National Association has done in the past, and is seeking to do again.

Senator SIMON. Finally, Mr. Tom Holmes, president of the National Association of Real Estate Brokers.

Mr. Holmes.

STATEMENT OF T.L. HOLMES

Mr. HOLMES. Thank you, Mr. Chairman, and good afternoon.

Distinguished members of this august body, I am immensely delighted and pleased for this prodigious opportunity to offer testimony in support of the Fair Housing Amendments Act of 1987, in total as it is proposed.

We in the real estate industry have not done a very good job in policing ourselves. On behalf of the National Association of Real Estate Brokers, Inc., and our affiliate organizations, some 10,000 strong, we are very pleased for this prodigious opportunity.

Recently, President Reagan said of this NAREB group:

> What distinguishes realists from other professionals in the industry is not color, though most of your membership is drawn from minorities; it is, rather, your area of special concerns. You are determined that all citizens, regardless of color or creed will have ready access to decent housing. You are indeed the conscience of the profession.

The Honorable Secretary Pierce, the Secretary of Housing and Urban Development, recently stated with regard to realists:

> As you know, we are pushing hard for fair housing at HUD, and I want to express my deep gratification that we have been able to work together so well in this vitally important area. NAREB's activities to promote equal housing opportunity and to provide training to its membership have been crucial elements in the struggle we have waged and the progress we have made over the years.

The Honorable Mervyn Dymally, chairman of the Congressional Black Caucus, recently stated on behalf of that prestigious body:

> For 40 years, Realists U.S.A. (NAREB) have fostered the general growth and individual achievements of minority real estate professionals. Your hard work has brought significant benefits to the minority community, the real estate industry, and to our economy as a whole. These efforts have been particularly far-reaching and constructive in reviving our cities and neighborhoods, a vitally important goal for a country whose overall population is becoming increasingly urban. Through such tangible gains, NAREB has provided real hope for the members of your respective communities and for the future prosperity of minority small businesses, which are an integral part of America's on-going success story.

Thank you, Mr. President. Thank you, Secretary Pierce. Thank you, Chairman Dymally and the members of the Congressional Black Caucus.

Our work, however, is not finished yet. We at NAREB cannot rest on our laurels. We must keep pushing until all Americans realize the dream of safe, decent, sanitary and affordable shelter. We are ever mindful of the tens of millions of ill-housed and ill-fed citizens of this great Nation as we recommit our energies, talent and vast human and economic resources in reducing the pain and suffering of the "other America."

Yes, we are experts on fair and affordable housing. For the past 40 years, NAREB has focused on serving this other America. The America that is oftentimes unserved or at best ill-served by the real estate industry. In this general context, may I remind you that the United Nations General Assembly has designated 1987 as the International Year of Shelter for the Homeless.

America must not lag behind the United Nations or any other world body in the pursuit of fair, decent, safe and sanitary housing for all of her citizens. It is almost incomprehensible to think that in America, in the year of our Lord, 1987, the most benevolent nation in the world, the most powerful militarily and technically advanced nation in the world, with all of the 21st century scientific knowledge and resources at her disposal, would be experiencing this degree of difficulties extending to all her citizens their inalienable rights embodied and guaranteed within the framework of the Constitution.

As a youngster growing up in Arkansas, I remember talking to my father about the various forms of overt housing discrimination. My father was a very proud American until the day he died in 1981. He was a World War II veteran, with a bullet lodged beneath one of his kidneys, hit while crawling the beach at Normandy, for America. I would ask, "Daddy, how come black folks live over here in the slums and white folks live on the other side of town in nice houses." I remember vividly his answer, "Son, you've got to have lots of money to live over there." My immediate innocent reply was, "Daddy, if we had the money, could we live over there?" He honestly stated this time, "No." I said, "Why not?" And he said, "Because we are black and they are white." He was obviously emotionally shaken by the final truthful answer he was forced to give, but he never stopped loving America and his patriotism toward her remained untarnished and impeccable.

This personal experience I shared with you is not unique to me or to the South where I grew up. There are millions and millions of similar stories. Mr. Chairman and distinguished committee members, my wife and I have three lovely daughters and I am hopeful and prayerful that as they grow up that I will never, ever be forced to tell them that we cannot live some place, any place because we are black.

With reference to the technical aspects of the legislation, I could refer all of my support to the comments recently made by Ms. Simon. In urging passage of this most important legislation, I would like to close, Mr. Chairman.

In closing, I would like to offer a tribute to this great land of ours called America. We respectfully love her. America represented by that great lady of freedom called the Statue of Liberty. We are proud of you, although perhaps you have not been as kind and as compassionate to some of your sons and daughters as you have been to others. We are still proud of you and we still love you. Although many of us did not receive the warm fervent hospitality on the historic shores of Ellis Island, many of your sons and daughters arrived in chains at Jamestown, Charleston and other dingy ports, but we still love you. You are great and we want to make you better.

Yes, proud lady, on the heels of your 210th birthday, I am emotionally and enthusiastically mindful of the important words inscribed on your trunk, written by Emma Lazarus, as you, great lady of freedom, so proudly and daringly stand dressed in your brand new wardrobe, waving your inflamed torch of freedom over Ellis Island for the world to see, you melodiously bellow:

Give me your tired, your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming share, send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door.

Thank you.

Senator SIMON. I thank you, Mr. Holmes.

[The prepared statement of Mr. Holmes follows:]

PREPARED STATEMENT OF T.L. HOLMES
PRESIDENT/CHIEF EXECUTIVE OFFICER
THE NATIONAL ASSOCIATION OF REAL
ESTATE BROKERS, INC. (NAREB)

Chairman Simon, distinguished members of this august body, I am immensely delighted and pleased for this proditious opportunity to offer testimony in support of the "FAIR HOUSING AMENDMENTS ACT OF 1987". I would certainly like to thank Senator Kennedy for sponsoring this legislation and for his long standing record in civil rights and fair housing and would also like to thank the 38 co-sponsors of this landmark legislation.

On behalf of the National Association of Real Estate Brokers, Inc. (NAREB), our affiliate organizations -- National Society of Real Estate Appraisers (NSREA), United Developers Council (UDC), Real Estate Management Brokers Institute (REMBI), Realtist Commercial-Industrial Society (RCIS), Realtist Investment Group (RIG) and the Sales Associate Division (SAD) comprising of the oldest and largest predominently minority trade association in the nation (some 10,000 strong).

Recently President Reagan said of this NAREB group, "What distinguishes REALTISTS from other professionals in the real estate industry is not color, though most of your membership is drawn from minorities. It is rather your area of special concerns. You are determined that all citizens regardless of color or creed, will have ready access to decent housing. You are indeed the conscience of the profession."

The Honorable Samuel R. Pierce, Jr., Secretary of the U.S. Department of Housing and Urban Development (HUD) stated recently that "As you know, we are pushing hard for fair housing at HUD, and I want to express my deep gratification that we have been able to work together so well in this vitally important area. NAREB's activities to promote equal housing opportunity and to provide training to its membership have been crucial elements in the struggle we have waged and the progress we have made over the years. Your

Your hard work with the local government and real estate officials has not only resulted in much fairer advertising and marketing policies, it has also established your organization as a very real watchdog in the constant struggle to eliminate discrimination and as an effective symbol for real estate professionals everywhere. There can be no doubt that the National Association of Real Estate Brokers, Inc. will persists in carrying forth its long standing crusade to keep fair housing issues at the forefront of our national consciousness."

The Honorable Mervyn Dymally, Chairman of the Congressional Black Caucus recently stated on behalf of that prestigious body, "For 40 years, REALTISTS' U.S.A. (NAREB) have fostered the general growth and individual achievements of minority real estate professionals. Your hard work has brought significant benefits to the minority community, the real estate industry and to our economy as a whole. These efforts have been particularly far reaching and constructive in reviving our cities and neighborhoods; a vitally important goal for a country whose overall population is becoming increasingly urban. Through such tangible gains NAREB has provided real hope for the members of your respective communities and for the future prosperity of minority small businesses, which are an integral part of America's ongoing success story."

Thank you Mr. President! Thank you Secretary Pierce! Thank you Chairman Dymally and members of the Congressional Black Caucus!

Our work is not finished yet. We at NAREB cannot rest on our laurels... we much keep pushing until <u>all</u> Americans realize the dream of safe, decent, sanitary and affortable shelter. We are ever mindful of the 10's of millions of ill-housed and ill-fed citizens of this great nation as we recommit our energies, talent and vast human and economic resources in reducing the pain and suffering of the "Other America".

Yes, we are experts on fair and affortable housing. For the past 40 years, NAREB has focused on serving this "Other America". The America that is oftentimes unserved or at best ill-served by the real estate industry. In this general context, may I remind you that the United Nations' General Assembly have designated 1987 as the International Year of Shelter for the world's homeless. This is intended to focus world attention and resources on developing new shelter policies and strategies for the world's poor. It is also designated to highlight the relationship between improved shelter, neighborhood conditions and economic development.

America must not lag behind the United Nations or any other world body in the pursuit of fair, decent, safe and sanitary housing for all of her citizens. It is almost incomprehensible to think that in America, in the Year of our Lord, 1987; the most benevolent nation in the world, the most powerful militarily and technically advanced nation in the world with all of the 21st Century scientific knowledge and resources at her disposal, would be experiencing this degree of difficulties extending to all her citizens their inalienable rights embodied and guaranteed within the framework of the Constitution.

Let me share with you a few personal experiences, and in a very real sense, attempt to illustrate to you some of the negative backdrops and attributes of unfair housing in America. Having grown up down in Southwest Arkansas in the late 40's, 50's and early 60's, I was introduced to unfair and overt discrimination at a very early age. I recall very, very vividly in my hometown of Texarkana, in public buildings, color and white water drinking fountains were prevalent and how I was once scolded at the tender age of four years old when my mother was insulted by a white department store manager because I as a four year old baby, inadvertently climbed up to drink from a white water fountain.

I was there when the infamous, recalcitrant and defiant Governor Orvil Faubus decided that Central High School and the educational opportunities it presented in Little Rock, Arkansas was too good for nine black children.

Think with me if you will the possible negative, psychological affects of this practice penetrated by the same system, that is supposingly designed to serve all citizens might have on a group or groups of millions of Americans. Not only at present, but perhaps for generations to come.

Beautiful public housing was not made available to black families until the late 50's. Superflously stated, what a stark constrast between the new black public housing and the existing white housing units. It was like comparing the Titanic with the rowboat.

As a youngster growing up, I remember talking to my father about the various forms of overt housing discrimination. My father was a very proud American until the day he died in 1981. He was a World War II veteran, with a bullet larged beneath one of his kidneys hit while crawling the beach at Normandie, for America. I would ask Daddy, how come black folks live over here in the slums and white folks live on the other side of town in nice houses. I remember vividly his answer; "Son, you got to have lots of money to live over there". My immediate innocent reply was, Daddy, if we had the money could we live over there. He honestly said this time "no". I ask why not? "Because we are black and they are white". He was obviously emotionally shaken by the final truthful answer he was forced to give. But he never stopped loving America, and his patriotism towards her remained untarnished and impeccable.

These personal experiences I shared with you are not unique. There are millions and millions of similar storied, Mr. Chairman and distinguished committee members. My wife and I have three lovely daughers, I am hopeful

and prayful that as they grow up that I will never, ever be forced to tell them that we cannot live someplace -- any place, because we are black.

Let me offer a few technical remarks with reference to the aforementioned legislation. Mr. Chairman and committee, I would like to call your attention to:

SEC. 6. DISCRIMINATORY HOUSING PRACTICE AMENDMENTS. (a) Additional Discriminatory Housing Practices.

We are particularly pleased with this section but would like to raise a bit of caution on "(3A), and I quote":

> "(3) For the purposes of this subsection, discrimination includes a refusal--
> "(A) to permit, at the expense of the handicapped person, reasonable modifications of premises occupied or to be occupied, by such person if such modifications are necessary to afford such person equal access to those premises";

We recommend that this section be a bit more definitive. We would not want a handicapped tenant to replace a bedroom wall and then move out.

(c) DISCRIMINATION IN FINANCING OF HOUSING AND INSURANCE. "SEC. 805. (a) In General.

We feel that this section is one of the most imporant sessions of the amendments. We are currently experiencing a multiplicity of problems with real estate financing instituted by a practice called "red-lining", thereby restricting the flow of mortgage funds into certain geographical areas.

The real estate insurance problem has reached the crisis stage around the country. Financial institutions and insurance companies have pretty much had a free hand in deciding with whom and where they do business.

This section is in desperate need of attention and focus. NAREB is of course available to offer our expert input.

(b) Additional Functions of Secretary.-- (1) Section 808(e).

We are in total agreement that an annual report to the Congress specifiying the nature and extent of progress made nationally in eliminating

discriminatory housing practices will go far toward securing the objectives of this legislation.

The Secretary's report to the Congress and made available to the public could provide a very real incentive for compliance.

"ADMINISTRATIVE ENFORCEMENT; PRELIMINARY MATTERS. "SEC. 810. (a) Complaints and Answers.

We are in support of:

"SUBPOENAS; GIVING OF EVIDENCE. "SEC. 811. (a) In General.

We are in support of:

"ADMINISTRATIVE ENFORCEMENT; HEARING PROCESS. "SEC. 812. (a) Conduct of Hearing.

We are in support of:

"ENFORCEMENT BY PRIVATE PERSONS. "SEC. 813. (a) Civil Action.

We are in support of:

"ENFORCEMENT BY THE ATTORNEY GENERAL. "SEC. 814. (a) Pattern or Practice Cases.

We are in support of:

In general, NAREB is very pleased with this proposed legislation and we are immensely grateful to testify in support thereof.

CLOSING REMARKS:

I know this distinguished body will do the right thing and will convince others to do same. I offer further the vast resources of fair housing experience of the National Association of Real Estate Brokers, Inc. in addressing these concerns.

In closing, let me offer a tribute to this great land of ours that we so dearly and respectfully love -- called America. America, represented by that great lady of freedom called the Statue of Liberty, we are proud of you, although perhaps you have not been as kind and as compassionate to some of your sons and daughters, as you have been to others, We are still proud of you and we still love you; although many of us did not receive the warm fervent hospitality on the historic shores of Ellis Island; Many of your sons and daughters arrived in chains at Jamestown, Charleston and other dingy ports; but we still love you. You are great and we are going to make you better. Yes proud lady, on the heels of your 210th Birthday, I am emotionally, enthusiastically mindful of the important words inscribed on your trunk, written by Emma Lazarus. As you great lady of freedom so proudly and daringly stand dressed in your brand new wardrobe, waving your inflamed torch of freedom over Ellis Island for the world to see; you melodiously bellows:

"Give me your tired, your poor,
Your huddled masses yearning
to breathe free, The wretched
refuse of your teeming shore.
Send these, the homeless,
tempest-tost to me, I lift my
lamp beside the golden door!"

Thank you very much.

Senator SIMON. There is one thing I would add. As I read your statement, Mr. Holmes, you had a specific suggestion; Mr. Raynolds, you had several specific suggestions. We welcome any specific suggestions you have as to how the legislation should be modified, we welcome. I cannot guarantee you that we are going to take all the suggestions, but we will certainly examine them.

We appreciate your being here to testify. The hearing stands adjourned.

[Whereupon, at 4:20 p.m., the subcommittee was adjourned.]

FAIR HOUSING AMENDMENTS ACT OF 1987

TUESDAY, APRIL 7, 1987

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:08 a.m., in room SD-225, Dirksen Senate Office Building, Hon. Paul Simon presiding.

Also present: Senators Specter, Hatch, and Kennedy.

Staff present: Deborah Leavy, chief counsel; Jeffrey Robinson, minority chief counsel; Cheryl G. Matcho, chief clerk; Margaret Morton, legislative fellow.

OPENING STATEMENT OF SENATOR ARLEN SPECTER

Senator SPECTER. The hearing will come to order. Senator Simon has sent word that he will be a few moments late and has asked that the hearing be started in his absence. We have an extensive witness list, and I know that Mr. Reynolds has commitments at 11 so we will begin at this point.

This hearing is a continuation of hearings started last week where we held two sessions on the Fair Housing Amendments Act of 1987. We are privileged to have a distinguished group of witnesses today, starting with the Honorable William Bradford Reynolds, the Assistant Attorney General in charge of the Civil Rights Division of the Department of Justice.

Before we call on Mr. Reynolds, I would like to insert in the record the prepared statements of Senator Simon and Senator Hatch.

[The prepared statements follow:]

PREPARED STATEMENT OF CHAIRMAN PAUL SIMON

The Senate's last hearings on the issue of fair housing occurred in 1979. The Judiciary Committee's findings 8 years ago are as true today as they were then—no enforcement provisions exist in current law to combat continuing housing discrimination. As a result, the law that was supposed to wipe housing discrimination from our country is not working.

Recent studies have shown unacceptable rates of discrimination against blacks, Hispanic Americans, disabled people, families with children, women and Asian Americans. The most recent Department of Housing and Urban Development sponsored study found that blacks looking to buy a home have a 48 percent chance of encountering discrimination; their chances in the rental market are 72 percent. Another study in Dallas found that dark-skinned Hispanic Americans were likely to be discriminated against in 96 cases out of 100 when looking for housing. Disabled people are also locked out of many housing opportunities. A 1980 HUD survey noted

that 26 percent of our Nation's rental housing market bans rental to families with children; another 50 percent sets limits on ages and numbers of children allowed.

The Fair Housing Act of 1968 was a landmark piece of legislation for its time, but it did not go far enough. While the 1968 law enables a victim of discrimination to report the incident to HUD, the Department has no enforcement power. HUD's authority extends only to mediation between the two parties; HUD is not empowered to issue "cease and desist" orders.

Because of this lack of enforcement authority, few victims of discrimination actually see their complaints redressed. As former Senator Charles Mathias noted on February 3, 1986, "Less than 1 percent of the instances of discrimination find their way into the HUD formal complaint process. HUD receives about 4500 housing discrimination complaints from individuals each year."

"Of those, HUD refers about two-thirds to 'substantially equivalent' State and local agencies for disposition. Of the 1,500 remaining with HUD, the Department decides to resolve only one-third. Of the roughly 500 cases, then, that HUD determines to resolve, only about one-half are successfully conciliated."

Carla Hills, a former HUD Secretary under President Ford, explained that those who break the law "know all too well that HUD has no meaningful enforcement power. Many have virtually ignored our conciliation efforts because they have no inducement to cooperate. In effect, the present law, in relying on conciliation, is an invitation to intransigence." Congress cannot allow this charade to continue.

The bill before this Subcommitee would permit redress through the Administrative Law Judge system. The ALJ process is simpler, less costly and faster. Over 28 Federal departments use the ALJ system. An individual complaint would be investigated by HUD to determine reasonable cause and HUD would first attempt reconciliation. If mediation fails, within 100 days, HUD would file a complaint with an ALJ and appear on behalf of the victim.

If the ALJ finds in favor of the plaintiff, the victim may move into the unit in question and recover expenses and damages if appropriate. The ALJ may also issue a "cease and desist" order. Violation of the order would be punishable by fines of up to $1,000 per day.

The bill also includes two new categories of people who are protected from housing discrimination—the disabled, and families with children. These two groups have seen a marked and alarming increase in discrimination. The bill allows those with disabilities, both mental and physical, to reasonably modify a unit at their expense. The bill also prohibits discrimination based upon the existence or number of children for an appropriatedly sized unit. Families with children may be excluded from actual retirement communities and other seniors' housing.

With the Nation's attention intently focused on the dire problems of the homeless, these two groups represent the traditional homeless and the new homeless. It is Congress' responsibility to make the search for adequate housing as easy as possible by promoting freedom of choice.

Housing discrimination contributes to a lack of self-esteem already present in many of its victims. Congress must ensure that the Nation's homeless numbers do not increase because a person found discrimination instead of a place to live. The United States must be a land of opportunity for all—not just those with a certain color skin, or without children, of a certain sex, or without physical or mental challenges.

There is a general agreement that the present enforcement mechanism is inadequate. Yet the administration has not endorsed this legislation or come up with anything it believes is better. The administration's silence is not golden. The time for action is at hand.

PREPARED STATEMENT OF SENATOR ORRIN G. HATCH

As we begin this third day of hearings on fair housing legislation, I would like to reiterate my endorsement of the basic objectives of this legislative effort. I am still persuaded that the enforcement of the 1968 Open Housing Act needs to be reinvigorated. If we are to achieve in some areas and perpetuate in others equal housing opportunities for all citizens, we must, for instance, make the conciliation process more effective. This will require backup mechanisms that will give parties an incentive to use conciliation. In addition, I feel that it is high time that Title 8 also cover individuals who may be subject to discrimination on the basis of handicap.

At the same time, I feel that there is room for improvements in S. 558. I would just like to list a few concerns in the hopes that I can work with my colleagues to improve the bill as this hearing process continues.

One concern I have with S. 558 is that it does not define housing discrimination in a manner sufficient to preclude integration maintenance. In Brooklyn, for instance, a large housing complex with approximately 17,000 tenants was operated pursuant to a quota which limited the percentage of apartments rented to minorities to 30 percent. In New York City, a housing project was operated with a quota which allocated 75 percent of the apartments to whites, 20 percent to Hispanics, and 5 percent to blacks. This kind of program, even if undertaken to achieve someone's notion of appropriate racial balance, is discriminatory. A black family that arrives after the quota for blacks is filled will be denied a housing opportunity solely on the basis of race. We ought to correct this discrimination, this obstacle to equal housing opportunity. We ought to take steps to ensure that no one is excluded from housing opportunities solely because someone decides that their racial class is already adequately represented in the neighborhood.

Another concern I have with S. 558 is that these sensitive discrimination matters should not be entrusted to administrative law judges. Just as we cannot imagine granting an administrative law judge the power to handle school desegregation cases, we ought to recognize that these policies are too important to be relegated to a second class adjudicative status. The Supreme Court has already noted that either party to a Section 812 housing action is entitled to seek a jury trial. The jury trial right is vital to our system and ought rarely, if ever, to be circumscribed.

Moreover, the Supreme Court struck down Article 1 bankruptcy courts because they attempted to adjudicate sensitive public rights. *Northern Pipeline* v. *Marathon Pipeline* (1982). This ought to counsel us to reconsider a system that makes an agency investigator, prosecutor, judge, and jury. I understand that the ALJ system is designed to expedite resolution of housing complaints, but ALJ systems are not necessarily noted for efficiency. When we increase the penalties under this act up to $100,000 per violation and increase the parties eligible to sue, we must ensure that we have found a constitutional and expeditious way to resolve the flood of potential new housing complaints.

I am also concerned that S. 558 makes the conciliation process less likely, rather than more likely, to work. This opportunity of the parties to work out the dispute without costly and prolonged litigation ought to be encouraged. Making conciliation results public, however, will discourage some parties from entering the process. Likewise is the requirement that conciliation agreements must be forwarded to the Attorney General if the same party is involved in two agreements within 5 years. A party may well avoid conciliation simply to avoid referral to the Attorney General.

A few other details may need clarification, such as the definition of handicap and aggrieved person, but the final thing I would note are the difficulties caused by the standard of proof utilized by many of the circuit courts. As I mentioned at our first hearing, an effects test has been employed to invalidate some housing opportunities which Americans may wish to continue to enjoy, such as an adults-only housing project or a local zoning ordinance designed to preserve a community's single-family home neighborhood. As we reinvigorate national housing opportunities, I would hope that we would take steps to avoid endangering beneficial state and local housing policies.

With these thoughts in mind, I look forward to hearing today's testimony.

Senator SPECTER. Mr. Reynolds, we know that it was not easy for you to arrange your schedule to be here. We appreciate your coming because we consider this to be a very important subject. You are at the core of these issues, so we appreciate your presence and your inputs and your assistance as we try to move through this important legislative proposal.

The floor is yours.

STATEMENT OF WILLIAM BRADFORD REYNOLDS, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. REYNOLDS. Thank you, Senator, very much.

I do want to thank you for the opportunity to present the views of the Department of Justice regarding the very important effort to amend the Fair Housing Act. As you know, this administration strongly supports a legislative effort to strengthen the enforcement

of the existing proscription against discrimination in housing. There can be no doubt that unlawful discrimination continues to pose a significant barrier to many individuals seeking housing in our society. There is also general agreement that while the Fair Housing Act has achieved much good, its enforcement provisions must be strengthened if it is to extend the promise of a color-blind society into the housing market.

The overriding goal of fair housing reform must be to increase the access of individuals to remedies guaranteed by the Fair Housing Act, while preserving procedural fairness for both complainants and respondents in fair housing disputes. Under existing law, an individual whose complaint cannot be resolved through conciliation is remitted to filing a private action in Federal court. Because the amount of money at stake in fair housing disputes is generally small, an individual may not find it worthwhile to file such an action. This problem is compounded by the current law's limitation of awards of attorneys' fees to indigent plaintiffs. Thus, we have repeatedly urged Congress to amend the Fair Housing Act to assist individual claimants in pursuing vindication of fair housing claims.

We also have asked Congress to amend the act to prohibit denials of housing based on an individual's handicap. In recent years, Congress has expanded the federal role in combating prejudice against handicapped individuals, and we believe that this role should be expanded to encompass housing decisions.

To redress the inadequacies of existing law, the administration drafted and urged passage of S. 2146 in the last Congress. The Department of Justice is currently working with HUD to produce a proposal for this Congress. We are encouraged that Senate bill 558 appears designed to achieve many of the goals that the administration has pursued in its past proposals and continues to support.

We do, however, have opposition of a certain nature to S. 558 in terms of the creation of a system of administrative adjudication for fair housing complaints. S. 558 would channel all individual complaints that could not be resolved through informal methods and did not involve an issue of zoning or land use law to an administrative law judge, an ALJ. The ALJ would be empowered to award extensive relief, including an injunction and compensatory and punitive damages. The order of an ALJ could be reviewed and enforced by a federal court of appeals.

S. 558, therefore, would authorize, for the first time, binding, administrative adjudication of individual civil rights claims. While we fully support the goal of providing victims of discrimination with speedy, inexpensive and effective redress, we remain convinced that channeling complaints through the administrative bureaucracy envisioned in S. 558 will not serve any of these goals. Because it contemplates sending large numbers of complaints through formal administrative adjudication, including review by a court of appeals, the administrative procedure will not provide speedy or effective relief for individuals who have been denied housing.

Our research demonstrates that administrative law judges simply do not provide speedy resolution of disputes. A survey of government agencies employing ALJs or their equivalent revealed the following average times for the processing of complaints before administrative law judges: the National Labor Relations Board in

fiscal year 1986 averaged 767 days, 25.6 months; the Social Security Administration in fiscal year 1986 averaged 421 days, or 14 months; the Federal Labor Relations Authority averaged 467 days, or 15.5 months; and the Department of Labor averaged 398 days, or 13.3 months, in black lung cases.

These numbers do not include the time required for judicial review of the ALJ's decisions. While this survey is not exhaustive, it is representative and demonstrates that ALJs do not offer a speedy dispute-resolution alternative that can realistically be counted upon to provide meaningful relief to an individual who has been denied an apartment because of race and simply wants to be allowed to lease that apartment.

The prospect of so prolonged an administrative review process, with individual relief coming, if at all, so many months later as to be unhelpful to most claimants, suggests no good reason for the creation and maintenance of an expensive new component of the standing Federal bureaucracy. Nor does it appear to provide any justification for removing this class of civil rights disputes from the courts, where they can be resolved by life-tenured judges pursuant to the Federal Rules of Civil Procedure and Federal Rules of Evidence.

Indeed, the available data indicate that district courts probably do a faster job of resolving housing disputes than would a system of ALJs. Although data limited to housing disputes are not available, the average processing time for all civil rights cases, excluding employment cases, in federal district courts is 11 months. We know from experience that housing cases frequently take considerably less time to resolve than other civil rights court actions because they are more likely to be resolved at an early stage of the litigation through a consent decree. Indeed, the Division has concluded by consent decree 47 of its 53 litigated cases in the past 3½ years. These cases have taken an average of only 4 months from the filing of the suit to final entry of a consent order and less than 9 months from initial authorization of the suit to such final entry.

For these reasons, the administration has opposed the creation of a system of administrative adjudication of fair housing disputes. We acknowledge, however, that while court processing remains the appropriate method for "pattern or practice" and zoning cases and those cases of general public importance, it would be desirable to create an alternative method for resolving garden-variety disputes involving individuals who just want to rent an apartment or buy a house but have been met with rejection simply because of race, sex, color, religion, handicap, or national origin. The Department of Justice, therefore, has ben working with HUD to produce an alternative that can provide relief to these individuals quickly enough to be meaningful.

Our approach envisions a four-pronged assault on housing discrimination. The first resort in every discrimination complaint that arises in a state or locality with an adequate fair housing law should be the state or local authority. The number of States certified by HUD as having fair housing laws substantially equivalent to the Federal law has risen since 1977 from 22 to 35 and the number of localities so certified has reached 67. Because existing law requires HUD to refer complaints to these jurisdictions before

it attempts to resolve them, the percentage of HUD's complaints handled at the State and local levels has gone from 39 percent in 1981, to 52 percent in 1982, to 60 percent in 1983, 67 percent in 1984, 64 percent in 1985, and 69 percent in 1986. These high levels of handling by State and local agencies should continue, and we counsel against enlarging significantly the permanent Federal bureaucracy.

In the absence of an adequate state or local law, responsibility shifts to the Federal Government to provide individuals with the opportunity for effective redress. The larger and more complex "pattern and practice" cases, as well as land use cases and matters involving novel legal questions or issues of particular public importance should, in our view, be referred at the outset by HUD to the Justice Department for handling. The Attorney General would retain his present authority to sue for injunctive relief to redress the unlawful conduct in these cases, and he would be authorized to seek additional remedies as well. Specifically, the Attorney General would be empowered to seek civil penalties up to $50,000 against first offenders and $100,000 against multiple offenders and an award of damages on behalf of the aggrieved person.

As to all other matters, we envision, as the third prong of our approach, that if HUD fails to conciliate a dispute within a time certain, the parties will be given a choice between voluntary and mandatory arbitration. We intend to create a streamlined and fast voluntary arbitration option that will give the parties a final resolution of their dispute within a very short, prescribed time. Because the parties will have agreed to the process, it will be possible to simplify the proceedings without running afoul of constitutional constraints. We believe that a process that promises fast, and therefore meaningful, relief will prove attractive to complainants. As an incentive to encourage respondents to participate, we are thinking of limiting the relief that can be awarded by the arbitrator in voluntary arbitration to injunctive relief and attorneys' fees. This would leave the award of punitive damages or large civil penalties as available relief only if the parties proceeded to mandatory arbitration or court.

If the parties do not agree to submit their dispute to voluntary arbitration, the Secretary could initiate mandatory arbitration with the agreement of the complainant. In order to satisfy constitutional requirements, mandatory arbitration will necessarily be a more protracted and formal process than voluntary arbitration, but it is our goal to create a structure under which far more individuals will opt for voluntary than mandatory arbitration. Mandatory arbitration will involve a hearing on the record, a written, reasoned decision by the arbitrator and an opportunity for review.

And, of course, rather than submit his or her dispute to arbitration, the victim of discrimination would retain the option to file a private lawsuit. The administration proposal would assist private suits by authorizing awards of attorneys 'fees to prevailing parties, lifting the limit on punitive damages and authorizing the award of civil penalties. These private lawsuits would be the fourth prong of our attack on housing discrimination.

This four-pronged approach properly maintains the current law's emphasis on the role of state and local government in combatting

housing discrimination. As a back up, it strikes the proper balance at the federal level between judicial and alternative methods of resolving fair housing disputes. It offers an alternative method—arbitration—that will prove faster and less expensive than a full-blown administrative process, but continues to send to federal district courts the most difficult cases and those with the broadest impact. There they will be submitted to the full play of our adversary system under the important safeguards of the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and decided upon by a life-tenured judge. This has been the traditional and highly successful method of adjudicating important individual rights in our constitutional system and should be retained for this important class of cases.

The combination of damages and civil penalties, available both in court actions and mandatory arbitration, will make discrimination even more expensive and should also encourage parties to resolve their disputes through conciliation and voluntary arbitration. We, therefore, believe that this package offers an innovative and the most effective means of strengthening enforcement of the Fair Housing Act.

Both the administration proposal and Senate bill 558 would prohibit discrimination based on an individual's handicap. While we are in agreement that such protection is long overdue, there are three aspects of S. 558's treatment of this issue that require some attention.

We continue to believe that the reasonable accommodation concept that is an element of the Rehabilitation Act of 1973 has relevance to the housing provisions. Individuals with a handicap should not for that reason be denied housing, and all reasonable efforts should be made to accommodate a rental unit to their needs. At the same time, upon leaving the unit, the cost of modifications to return the premises to their prior condition should appropriately be borne by the handicapped individual. Therefore, language is necessary requiring that renters agree in advance to restore the premises to their original condition prior to any modification, reasonable wear and tear excepted. Failure to include such language may well make landlords more reluctant to rent to individuals with handicaps and result in a reduction in property available for occupancy by handicapped individuals.

Although we support the definition of "handicap" in S. 558, insofar as it goes, the following language, which appears in the administration's proposal, should in our view be added. That language is that "but such term"—handicap—"does not include any current impairment that consists of alcoholism or drug abuse, or any other impairment that would be a direct threat to the property or the safety of others." These impairments are in our view acceptable bases for the denial of housing.

We also fail to understand the requirement that modifications be permitted if necessary to provide "equal access" to premises. Presumably, this language refers to access equal to that of individuals without any handicap condition. The requirement of "ready access" has heretofore been used consistently by Congress in every piece of legislation dealing with the rights of handicapped individuals. It fully meets the needs of persons with handicaps without imposing

the unnecessary burden of ensuring that every aspect of a structure is precisely as accessible to persons with handicaps as it is to those without handicaps.

On another aspect of the bill, S. 558 would add "familial status" to the list of grounds upon which housing decisions may not be premised. This addition is apparently designed to prohibit refusals to rent based on occupancy by children living with parents or custodians. No other Federal civil rights statute prohibits discrimination based on familial status. Its inclusion in the Fair Housing Act would dramatically extend the reach of the Federal Government. The consequences of this expansion have not been fully explored. In our view, housing discrimination based on familial status is not so wholly arbitrary or unreasonable that it should drain federal resources from the enforcement effort against more egregious forms of housing discrimination, such as those based on race, color, national origin, sex, religion, and handicap. We believe that the issue of banning housing discrimination on the basis of familial status should be left to States and localities who are in the best position to measure its impact, if any, on a particular housing market. Regardless, we would oppose inclusion of discrimination based on familial status in the present, necessary effort to buttress enforcement of the Fair Housing Act. Because we view this expansion as a significant foray into the unknown that should only be taken after considerable deliberation, if at all, we would oppose its interjection into the effort to move toward speedy enactment of the strengthening provisions that the administration supports.

Mr. Chairman, there are some other features of S. 558 that we think could certainly stand some further deliberation and consideration, and I have listed them in my more extensive statement and will not go into them now.

I would just like to say that I am very encouraged by the similarity of the goals and approaches to strengthening the Fair Housing Act that both the administration and members of this body are pursuing, and I would look forward to working with the subcommittee to enact legislation that will accomplish the shared goals. Thank you very much.

Senator SIMON. I thank you very much. We are certainly in agreement that there has to be strengthened enforcement.

One of the areas of difference is whether we have arbitration or whether we refer things to an administrative law judge. I have to say I am appalled by the figures that you have on page 3 of your statement about the length of time before administrative law judges.

I guess I ask this of you as well as my colleagues on the committee. Would there be anything wrong in our proposal if we were to say a discussion has to be rendered within 90 days of a hearing before an administrative law judge?

Mr. REYNOLDS. I think if you begin to try to truncate the time within which deliberations can be made in an adjudicative process of an administration nature, that you could run into some problems.

It is the case that the whole administrative law judge--and it would also pertain to mandatory arbitration--piece of this legislation is one that does at least raise some legitimate constitutional

questions. We have looked at it. We think that the law in this area is rather imprecise, but that on balance the ALJ process, if it is set up in a way that does not add the kind of shortcuts that I think we would like to be able to maybe impose, can pass muster constitutionally.

But I would say to you that I think that there are very legitimate and serious constitutional questions raised by the ALJ process, and I would be concerned the more one tries to truncate that particular proceeding, the more problematic it is under the Constitution to move away from an article III adjudication and deny to the litigants what they would get in court, and have them go into a proceeding where it is mandated that a decision has to come down within a date certain or a certain time period.

So I cannot say right now no, it cannot be done. I would like to just raise a cautionary note and indicate to you that, with the other constitutional questions that lurk in this area, that might push it over the edge and be a serious problem.

Senator SIMON. From the constitutional point of view, what is the difference between the administrative law judge procedure and the arbitration procedure you are talking about?

Mr. REYNOLDS. I think that the mandatory arbitration procedure as a process, except for the fact that I think that it could be done in a more expedited fashion and, my sense is, in a less costly manner; more expedited because you do not have the same kind of backlog that necessarily gets into the works in an ALJ process where you have got to push all the cases through whatever series of ALJs and they stack up, and therefore we wind up with the kind of figures that are in the testimony; and less costly because I think that it would be a less expensive technique to move to the mandatory arbitration as we have fashioned it.

But in terms of the process itself, I think that you have to be as concerned in the mandatory arbitration piece about the constitutional due process requirements as you do with an ALJ.

Senator SIMON. Senator Specter. I want to thank Senator Specter for opening the hearing. Senator Specter.

Senator SPECTER. Thank you very much, Mr. Chairman.

Mr. Reynolds, I too am glad to see the areas of agreement in your testimony about the recognition of the need for tougher enforcement and the move in for a line of remedy.

When you talk about arbitration, the current bill, S. 558, has a submission to arbitration on a voluntary basis, a more informal approach.

Mr. REYNOLDS. Right.

Senator SPECTER. When you start to talk about mandatory arbitration and you express a preference for that to the administrative law judges because the ALJs have these periods of delay, and Senator Simon has sought to perhaps have a cap on the amount of time that can be spent. I would say to my colleague that I think the caps are good in theory, but when you get into a courtroom or a judicial proceeding, they are not observed for a variety of reasons, some justified, and it is administratively impossible to find out which ones are unjustified and which ones are justified, where you have evidence and arguments and deliberations, et cetera.

The whole judicial process could be expedited enormously in this country if we really had a stern hand on that particular tiller.

But, Mr. Reynolds, the concern I have is about the new mandatory arbitration procedure which you are suggesting which I think will probably be just as long; and the concern is that if you start to structure a new format here, we have existing procedures for administrative law judges. We know what it is. We know it is constitutionally sound.

What precedents are there for this kind of a mandatory arbitration system which you have articulated, which looks very much like an administrative law proceeding? It is on the record. It has judicial review. If you have arbitrators, do we not start to run afoul of a whole new series of tests and challenges to the imposition of judicial orders or orders which are traditionally judicial, like cease and desist orders. Are arbitrators going to be able to impose such sanctions, such orders?

Mr. REYNOLDS. I think it would be. I would not be too concerned about that kind of challenge. I think you are right that the alternate dispute resolution mechanism which we are talking about is new, and therefore, we do not have as much history behind it. But the Administrative Conference of the United States has done a rather extensive study in this area and has come out on the side of mandatory arbitration as superior to the ALJ process, both in terms of expedition and cost and in terms of the kind of effective sort of meaningful responses that can be given, and in precisely the sorts of cases that my proposal would suggest would be going to mandatory arbitration, which are those that would not have a precedential effect that are governed by a statutory norm or standard, that are not complex factually, and that are disputes between private parties.

Senator SPECTER. Where do these arbitrators come from?

Mr. REYNOLDS. Well, there are several ways that we could set it up. They would be selected from a pool of people in the legal community who will be available to serve as arbitrators. They could be from the same pool as the voluntaries, those that come from the voluntary pool.

Senator SPECTER. Will they not necessarily have less expertise than administrative law judges?

Mr. REYNOLDS. Well, I do not think that necessarily has to follow. I think actually the way that I would envision this working that it would probably be the case that you could find arbitrators with quite a great deal of expertise.

The Senate bill indicates arbitration is going to be a feature of it at the voluntary stage, and those people would also be able to serve at the mandatory stage. I think that the mandatory arbitration would involve those cases that require less degree of specialized expertise because the novel issues, the pattern and practice, the zoning issues are ones that we think would go to the court.

Senator SPECTER. Well, Mr. Reynolds, it seems to me they might be expert and they might not be expert. If you are seeking arbitrators, if you go to the American Arbitration Association idea, there are people who volunteer. Some of those who volunteer are quite good. The American Arbitration Association has arbitrators who are not lawyers. You probably would need lawyers here.

I think it would be pretty hard to get lawyers to serve on a continuing basis to develop the kind of expertise that we are looking for.

But with respect to the imposition of the judicial remedy of an injunctive nature, are there precedents in existence for the kind of mandatory arbitration that you are suggesting which would have the authority to impose mandatory injunction?

Mr. REYNOLDS. Well, I do not see a problem with the arbitrator and mandatory arbitration, if there is the kind of hearing on the record at all. There is no problem with him imposing that kind of relief or forming that kind of relief.

Senator SPECTER. I understand you do not see a problem, but is there any precedent for it?

Mr. REYNOLDS. I do not know whether under the Commodity Exchange Act, which does have a mandatory arbitration piece or feature, whether that is a form of the remedy or not. I can check that.

Senator SPECTER. Well, Mr. Reynolds, that is the problem I have.

Mr. REYNOLDS. It has been used under the Federal Insecticide Act, but I do not know whether injunctive relief is available there.

There are some places where it has been used, and I think that if you set up mandatory arbitration in the proper way that that kind of relief could be afforded. Again, you would, I think, have to require some kind of a review process at the appellate court level.

Senator SPECTER. I have a real problem with it, Mr. Reynolds. When you come forward on behalf of the Administration and propose an alternative, where we face the basic question about whether there is any precedent, and you cite two procedures and you are not sure where there is a precedent, where any procedure has been established which has equitable relief which is ordered by arbitrators.

When we are structuring this remedy, I would be very reluctant to cut new ground on this important measure where we may run afoul of constitutional limitations or have challenges which may tie this matter up for a protracted period of time.

So that at least speaking for myself, if the Administration's going to pursue this matter, I would appreciate it if you would bring to us whatever precedents there are.

Mr. REYNOLDS. Sure.

Senator SPECTER. So that if there is a challenge to this mandatory arbitration, we can look to some precedents, because I know of none, and I will say that I have not surveyed the field. But it would seem to me that if the Administration is going to propose this that you would have some precedents at hand to back it up.

Mr. REYNOLDS. We certainly would be required and would want to satisfy you that that kind of relief could be afforded in a mandatory arbitration proceeding, and I think it could.

Our concern is that the precedent we do have really relates to the ALJ process, and it is not a very happy story in terms of achieving what we are trying to achieve, I believe, in the whole amendment to the Fair Housing Act—which is to get through the process quickly the kinds of claims that are there, where individuals are trying to get housing and they do not want to be hung up for 25 months, 13 months, whatever the process is, in their effort to do it.

What we are struggling with is to come up with a process that will work to expedite that, and I think that the one we are proposing does work in terms of what can be done, what kind of relief can be awarded, and I think it would expedite the process considerably. That is why we are suggesting that as a way to go, rather than the one that leans on a precedent that has been proven to be big, cumbersome and prolonged.

Senator SPECTER. Well, we are concerned about expedition, but we do not want to put into effect a procedure which is going to be invalidated or be subject to a lot of challenges.

Let me move to this issue of the civil penalty, which is a centerpiece of the enforcement in putting teeth into these laws. Is there any precedent, to your knowledge, for arbitrator imposing any kind of a civil penalty in the range of $100,000?

Mr. REYNOLDS. I do not know where we would. I do not know if you have a precedent for ALJs doing that, either. I think that is probably new ground for both arbitrators and ALJs.

I think that we do have certainly a precedent of arbitrators being in a position to award considerable amounts of money to one party or another in an arbitration proceeding.

Senator SPECTER. Those are all on damage claims. Those are all on claims of certain losses. Where you have a civil penalty——

Mr. REYNOLDS. Well, those are just ones arbitrating disputes as to contract rights; baseball players, for example. I mean, I think that the arbitration procedure is flexible enough that it can, indeed, be set up so as to comfortably permit the arbitrators to award this kind of relief to the same extent that you could in the ALJ process.

Senator SPECTER. There are penalties in the OSHA cases which we had discussed when earlier witnesses were on. I would be interested in any precedents you have along those lines, because I have a concern that if you have a civil penalty, there are going to be some real potential infirmities to having arbitrators impose those penalties.

Let me raise one other issue very briefly, if I may, and that is with respect to your opposition to extending the law on family status. You say on page 10 of your testimony:

> In our view, housing discrimination based on familial status is not so wholly arbitrary that it should drain federal resources from the enforcement effort against more egregious forms of housing discriminations such as those based on race, color, national origin, sex, religion and handicap.

Where you say family status is not so wholly arbitrary, why not? If somebody is denied rental on the basis of family status, why is not that qualitatively sufficiently arbitrary so that there ought to be an enforcement mechanism?

Mr. REYNOLDS. Well, I guess the starting point on this probably is the whole question of freedom of association which we have in this country. And where Congress has, indeed, intruded upon free association, it is done so in those circumstances where you have a wholly irrational distinction, such as race or gender or handicap.

It is not the case with regard to familial status or the decision of people to live with others of a certain age group or certain interests that that is a wholly irrational distinction. In fact, it is rationally based in many respects.

I think that where we are going to embark a new area we are carving out, where we are going to deny freedom of association, and it is not one that is based on wholly irrational distinctions, that we do think there is a concern there and it should be probed very carefully. The exception, and it is a rather narrow exception to the familial status that deals with only a certain category of housing that will be available to the elderly, it seems to me leaves as one of the consequences for this kind of a provision a severely adverse impact on the elderly citizens of this country. And I think that if that is a consequence, that is one that we certainly ought to weigh in the balance in terms of putting in place a familial status kind of provision.

So I guess that the major point is that we do have a free association right and interest in this country. The intrusion by Congress heretofore on that has been based on distinctions that are wholly irrational, and I think that certainly with regard to people wanting to live together with others of certain age groups, that there is a rationality to that. In fact, it is one that was recognized by Justice Douglas in the *Belle Terre* case in the Supreme Court some years ago. My sense is that before we intrude on that we ought to probe it very carefully.

Senator SPECTER. Well, my final comment would be that what you are really saying is a number of things: that the free association value is such that it is not really arbitrary at all to exclude families, or people with children. And as a value judgment, mine would be to the contrary.

We have had some evidence presented so far in the hearings about it being a serious problem, and we are going to have to evaluate just how serious it is. With respect to the impact on the elderly, you are suggesting limitations in housing availability, and I think that certainly is a problem that we are going to have to address in other ways.

I would ask you to rethink this issue of excluding the family discrimination. I would ask for the evaluation of the Department of Justice as to just how pervasive a problem it is. If you think it is not a pervasive problem, I would be interested to know that, if you think that it really is not a serious problem, because the evidence presented so far suggests that it is a serious problem. We really have to make a policy judgment in a congressional sense as to whether we feel it is arbitrary.

Thank you very much, Mr. Reynolds. Thank you, Mr. Chairman.

Senator SIMON. Thank you, Senator Specter.

If I could just add, as far as the elderly, the largest organization representing the elderly, the American Association of Retired Persons [AARP], has endorsed the bill.

Senator Kennedy.

Senator KENNEDY. Thank you.

Welcome, Mr. Reynolds. Just to continue along on this point about discrimination against families. Of course, you might use your rationale about "freedom of association" to apply to discrimination on the basis of race or handicap, prior to the times that action was taken by the Congress and the Senate—prior to the time we passed the fair housing bill, and until recently when we made some important progress dealing with the disabled.

It just surprises me that an administration that prides itself on being "pro-family" would rely on your explanation about a freedom of association to oppose, including provisions to ensure that there is not going to be discrimination against the family.

I think you have gathered from the members of this committee that we believe that this is certainly a matter of very substantial importance. I believe the case has been made with regards to discrimination against families, but I would join in the requests that were previously made for any information you have that would indicate it is not a problem.

Mr. Reynolds, I wrote to you on March 11 a letter requesting the basis of your earlier testimony. At a hearing on March 10, 1986, you indicated the administration was considering proposing an alternative dispute resolution mechanism for handling individual complaints of housing discrimination. I requested you to please describe the alternative dispute resolution mechanisms under consideration by the administration and to provide copies of the studies, statistics, memoranda, reports, other documents, analyzing, referring or relating to said mechanism.

We are very hopeful we are going to be able to move this legislation. We had heard that you had a proposal under consideration. We were interested in learning about it, and the rationale and the justification for it. I certainly want to get your response. I know everybody gets behind in the mail, but this is obviously a key element in this whole legislation, and we want to be able to address this issue and deal with the substance of it.

In addition, we asked questions about the efficiency, speed, costs and burdensomeness of adopting the administrative mechanism included in S. 558. So we inquired of the department. We have heard testimony on that mechanism, and I think there was very considerable support. I quite frankly do not think that any of the testimony that I have heard to date undermines that particular enforcement mechanism.

You have indicated both in your testimony here and previously this other option. We are eager to learn more about it. We have really got to have it, because, Mr. Chairman, I am very hopeful that we can take action on the legislation. So I would just reiterate and hope that you will be able to at least address this mail and get back to us with the information.

Mr. REYNOLDS. Senator, I am aware of the letter, and my problem has been actually that I thought I was going to have a hearing yesterday before you in another proceeding and I had this hearing and I was out last week. That letter I hope we will be able to have answered by the end of the week for you, and to send up a response to it.

Also we are working with HUD and others in the administration to finalize a proposed alternative legislation, and we are moving as fast as we can to get that to you.

I realize you are on a fast track, and I apologize.

Senator KENNEDY. OK. That is fine.

Mr. REYNOLDS. Other events have interrupted getting this to you as fast as I would have liked to.

Senator KENNEDY. I appreciate it.

When you review the data on discrimination against children, I hope you also get a look at that HUD study of 1980 on discrimination against children. I think that there is pretty good information not only in that 1980 study, but certainly since that period of time. I think it is increasingly a problem, and I think you ought to take a look at it.

I noticed in your testimony that you address some of the questions of administrative law judges and the time that was taken in terms of certain of the various agencies. As I understand the GAO study that is referred to in the testimony largely blames the delay that occurs in the administrative process to extensive agency review of administrative law judge decisions and also to more complex procedures than necessary.

Our bill, as you know, provides for the expedited procedures. Specifically, it provides that the administrative judge's order is the final decision of the agency. In addition, we also provide deadlines for HUD's investigation of cases. So I think that the illustrations which you give in your testimony have been largely addressed in the GAO study as well. And I think if you look at the bill, I think it resolves the concerns expressed in your own testimony.

Can you answer what really is the difference between an administrative procedure and an arbitration procedure if you provide for judicial review of the arbitrator's decision? If you provide for judicial review, are we talking about a semantic difference or are we talking something of real substance? It seems to me once you require judicial review, you are going to have to have a hearing record, and all the other kinds of details which are also essential when matters are heard by an administrative law judge.

Mr. REYNOLDS. Well, I think constitutionally one has to have the review feature in there. My sense is, both in terms of the expense of the arbitration proceeding and also in terms of the manner of the expedited processing, that you come out ahead with the mandatory arbitration.

I guess one of the major savings in time and processing, it would seem to me, with the arbitration versus the ALJ is that you do have a serious problem with the ALJ process of a backlog of cases that cause delay in terms of the ALJ just getting to the case. I think that the mandatory arbitration procedure would alleviate that considerably and allow you to start the engines a lot sooner and get it through the process a lot quicker. So I think that is one of the major time cost savings that we would see, as well as I do think that the mandatory arbitration as we would set it up would wind up receiving, as the incentives would work, far fewer cases. And we think that there is a cost saving there as well as a time saving.

But that would be the principal area of saving, I think. I do agree that there would be a review process that would be necessary in the mandatory arbitration piece.

Senator KENNEDY. Well, that is why it will be worthwhile to get your analysis of that, rather than just the broader kinds of statements. We are going to have to address those issues before the other members of the committee and I am sure on the floor as well.

There is also a basic issue, which was raised earlier, about where arbitrators are going to come from. You talked about a pool. I dare-

say the greater the experience a judge has with the rules of law and the case law to be applied, the easier it is to expedite cases. Experience expedites cases.

When you develop this pool, can you tell us who is going to select the pool? Has that been worked out?

Mr. REYNOLDS. I would think the Secretary would be the person that would wind up selecting.

Senator KENNEDY. And do these pools work?

Mr. REYNOLDS. Again, Senator, I am trying to answer the best I can, but these are things that we are in the middle of trying to resolve. So when we send a proposal up here, we will have thought through all the ramifications.

My sense is that it would be the Secretary who would select, and my sense is that the pool we are talking about would not suffer any for experience as opposed to an ALJ process. And I think that it could well be that the individuals who would be available in the mandatory arbitration would be the same individuals that could also be available in the voluntary.

In other words, I do not think we are talking about a different cast of characters, which would mean that the experience factor would be enhanced with regard to the mandatory arbitration.

Senator KENNEDY. Is it your sense that they would serve full time?

Mr. REYNOLDS. I do not think they would serve full time, no. I think that may be one of the ways that there would be a cost saving. I think that they would serve for purposes of the case or cases that they have, but it would not be full time, as in the other arbitration kinds of alternatives.

Senator KENNEDY. But have you reached at least the fundamental decision that the arbitration way is a preferable way rather than case by case adjudication in the Federal courts?

Mr. REYNOLDS. Well, again, what we are trying to do, I think what everybody is trying to do is come up with a piece of legislation here that is going to treat with one of the core problems, which is a prolonged resolution of these kinds of cases. We had sent up legislation earlier that had relied exclusively on the courts, and we thought that that would be useful.

I think to the extent that there is a need here to try to work through collectively a process, a total process that is going to be most responsive, what we are saying now is that we think that there is a lot of potential in the arbitration alternative as part of an alternative dispute resolution. And I think that a lot of that comes from the fact that the Administrative Conference of the U.S. Courts has done a study and has looked at arbitration, alternate dispute resolution, ALJs, and has come down on the side of saying that the government ought to be moving in this kind of direction for alternate dispute resolution which will enhance the whole process, the whole review process, and expedite it. That is why we think this is a good opportunity to put that in place here.

Senator KENNEDY. My time has expired. The Administrative Conference, could you give us the reference and when that was, just for the record? You can just supply it later on.

Mr. REYNOLDS. Certainly.

[Letter for the record follows:]

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

MAY 22 1987

Honorable Paul Simon
Chairman
Senate Judiciary Subcommittee
on the Constitution
United States Senate
Washington, D.C. 20510

Dear Senator Simon:

As you know, we are both working for legislation to strengthen the Fair Housing Act by, among other things, providing effective mechanisms through which individuals may assert housing discrimination claims. Your bill, S. 558, would establish an administrative law judge process, while the Administration is developing a proposal that will involve the use of arbitration.

Your proposal permits administrative law judges to provide not only injunctive relief, but also compensatory relief for actual damages, and punitive damages. Your proposal also authorizes the Attorney General to obtain civil penalties in his litigation under the Fair Housing Act.

We also have been contemplating renewing the Administration's call for the availability of civil penalties in Attorney General actions under the Fair Housing Act as well as providing both injunctive relief, restitution, and additional damages in mandatory arbitration. Our proposal further contemplates that a voluntary arbitration process would be available, which would be quicker and with less penalties available to the arbitrator as an incentive to both parties to use this quicker process.

With respect to the award of relief beyond injunctive relief and restitution in administrative law judge proceedings, mandatory arbitration, and federal district court actions, I believe that the recent Supreme Court decision in Tull v. United States (Apr. 28, 1987) is of significance. This decision, which addressed Seventh Amendment issues with respect to the Clean Water Act, is relevant to the question whether non-equitable relief can be awarded under the Fair Housing Act absent a jury's determination of liability. This question, of course, has major significance with respect to S. 558 and the Administration's developing proposal. We are still studying the ramifications of the Tull v. United States decision.

It seems to me that there are significant areas of agreement between supporters of S. 558 and the Administration with respect to the need to strengthen the Fair Housing Act. It would be unfortunate if the legislation, which is developed to strengthen the Act, is constitutionally infirm on Seventh Amendment grounds.

Sincerely

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

78-076 O - 88 - 12

Senator KENNEDY. Let me just say I welcome your comments. I am encouraged by the similarity of goals and of approaches to strengthen the act, and your stated desire of working with the committee. We want to work with you. We want to work in a timely fashion. At least I do hope that you will be forthcoming in your proposal because I am very hopeful the Chair will move this legislation forward.

I thank the Chair.

Senator SIMON. Thank you, Senator Kennedy. We do intend to move expeditiously.

Before I call on Senator Hatch, Senator Specter has asked for an additional 30 seconds here.

Senator SPECTER. Thank you, Mr. Chairman. I just wanted to take a moment to introduce Ms. Laetitia Pferdehirt from Pittsburgh who will be testifying. Ms. Pferdehirt is in the front row in the wheelchair and has been the victim of discrimination because of being handicapped, and I wanted to make this presentation briefly to the panel. I think she will have some very important testimony to provide. I regret that I cannot stay because of other commitments, but I shall review the transcript and will be working with you, Mr. Chairman, and others on the committee to try to expedite the processing of this legislation.

Thank you.

Senator SIMON. Thank you.

Senator Hatch.

Senator HATCH. Thank you, Senator Simon. In 1974, the Supreme Court declared in the *Curtis* v. *Lother* case that either party to a suit under section 812 of the Housing Act had a right to a jury trial.

Why is the jury trial right vital to housing discrimination cases, and what would be the implications of replacing this right with administrative law judge proceeding or arbitration, albeit mandatory arbitration?

Mr. REYNOLDS. Well, the *Lother* case did, indeed, say there was a right to jury trial. As I indicated earlier, I think that there are some constitutional questions concerning a move to the ALJ process which would put in place a procedure that would not afford jury trial. I think that the Supreme Court's more recent case in *Northern Pipeline* drew a distinction between public rights and private rights. And in the discussion of the plurality and the several opinions of the Justices of that case, I think gave us some clear indications that if structured carefully you could appropriately, in terms of vindicating public rights, have a process that would allow for some administrative adjudication in this area without a jury trial.

Senator HATCH. I see. Could you please explain further your concerns about the affirmative duties of "each federal or other governmental entity" in section 7(a)(2) of S. 558?

Mr. REYNOLDS. Well, I raised that in my testimony as being something that we are concerned about. We have seen, I guess, at least three circuits courts who have looked to that affirmative duty requirement as one that imposed some degree of racial balance that would be necessary in the housing market. And the real problem is that I think if legislation begins to move down that road, we

are going to have the whole question of integration maintenance as part of the feature of fair housing in this country. Integration maintenance is where you put a cap on the number of minorities that can go into a housing complex in order to ensure that you have a certain proportion of minorities and non-minorities.

Senator HATCH. The *Starrett* case?

Mr. REYNOLDS. The *Starrett City* case. And I think that one of the things that we are concerned about is that the circuit courts are tending to read those kind of provisions as imposing some affirmative obligation to achieve some degree of proportionality and maintain it in the housing area. And I would be concerned if we had legislation that was put in place that indeed gave some degree of comfort to that because I think that the real losers in that kind of a scheme are the minorities in this country who are on waiting lists more than non-minorities, and would be jumped over and denied housing simply because of race.

Senator HATCH. Well, as you know, in that particular case, a large housing project, involving some 17,000 inhabitants, had a 30 percent quota which basically, once it was filled, effectively excluded blacks or other minorities—blacks in this case—from being able to enter the housing in that particular area.

Mr. REYNOLDS. That is right. And it was done in the name of, as I say, integration maintenance or the effort to ensure that the housing complex was proportional as to race.

Senator HATCH. Well, let me just ask you, while we are on integration maintenance, what about the *Williamsburg* case? You recall in that case the housing project was operated with a quota that allocated 75 percent of the apartments to whites, 20 percent to Hispanics, and 5 percent to blacks.

Now, once again, a black or Hispanic family could not gain full access to this housing project if the quota was already full.

So, again, that would seem to me to be penalizing minority families in order to achieve some mythical notion of racial balance.

Mr. REYNOLDS. I think that is right. And it has also got the unfortunate further adverse impact on those individuals that do not fit into the particular category that has been assigned. So, Asian-Americans, for example, are denied housing because they don't have a percentage allocated to them.

That was the situation that happened in the *Shimkus* case, the *Gerston* case out in California, where we had an integration maintenance kind of a remedy that was put in place, that was to benefit blacks in that housing unit. And, as a consequence, other minorities were being turned away because they did not have the particular percentage reserved for them.

Senator HATCH. Well, do you think title VIII ought to permit this form of discrimination?

Mr. REYNOLDS. No. We have argued in the courts, and are quite, I think, clear in our minds that that is not what title VIII was intended to accomplish. It certainly runs counter to the whole purpose and intent and letter of title VIII which says that we should not be denying or depriving individuals, excluding individuals because of race in the housing market.

And I think that it is particularly the case that it is not something that should be tolerated under title VIII, since those that are excluded in this instance are minorities of one group or another.

Senator HATCH. Well, as a contrast of those two cases, I cite the *Birney* case.

Mr. REYNOLDS. Right.

Senator HATCH. If you recall, in that case the housing project authorities calculated that if a particular building had a higher percentage of blacks in a particular unit than in the project as a whole, it was considered to have a black racial imbalance. Any vacancy that came up then had to be given preferentially to whites.

Mr. REYNOLDS. Right.

Senator HATCH. So, once again, a black would face obstacles entering the housing situation if the quota was already full.

What about that form of discrimination?

Mr. REYNOLDS. Well, unfortunately, in most of the cases where it has come up thus far, what we have also seen is that it is predominantly blacks who are on the waiting lists and, therefore, they are the ones that are passed over and denied any opportunity to get into the housing unit whatsoever in order to reserve those units for whites to achieve some degree of, as it is called, integration maintenance or some degree of balance in the housing market.

Senator HATCH. We could go through a lot of cases here, and point out disparities. But any time you start having quotas, you start having these types of disparities.

Mr. REYNOLDS. I think that is right. And I think that we have seen some courts that have read the language that we are talking about here in a way that would suggest that that is a requirement of the legislation. And I could caution—raise that caution because I do not believe that is what the Senate intends.

Senator HATCH. Do you have any concerns regarding the proposal of S. 558 to make public the results of conciliation?

Mr. REYNOLDS. I think it is a bad idea to legislate to make public that kind of information. I think that there are ways in which those—I believe that the bill says that that information should be provided to the Department of Justice as well as to be made public. I think that there may be reasons to provide that information to the Department of Justice. I think that there may be instances on a case-by-case basis where members of this Committee might want some of that information. But I think that you have real problems when you legislate to make public information that is essentially of a private nature and, I think, raises a lot of questions under the Privacy Act as exactly what can be disclosed and put out in the public.

I am not sure that I understand that there is a protection that is served by doing that. I think that whatever the interest is can be well protected by having a much more discreet disclosure on a case-by-case basis as needed and as necessary.

Senator HATCH. Thank you, Mr. Chairman.

Senator SIMON. Senator Kennedy.

Senator KENNEDY. This whole question of integration maintenance is not the thrust of this legislation, is it not? You are not suggesting that your arbitrators board or whatever——

Mr. REYNOLDS. No.

Senator KENNEDY [continuing]. Or whatever mechanism that we are talking about is going to be involved in these kinds of cases, are you?

Mr. REYNOLDS. No. I was addressing, though, a feature of this legislation, which says that as to all agencies involved in a housing program it is an affirmative duty to achieve the purposes of the act. And one of the things I think Congress ought to make clear is that that should not be misread, as it has by some courts, to say that the agencies are therefore required to achieve some degree of integration maintenance or some degree of proportionality based on race in the housing markets as an affirmative duty.

And I think that we have seen courts that have tended to move in that direction. And I believe that it is counterproductive and counter-intuitive to what the purpose of the legislation is.

Senator KENNEDY. Well, I welcome that answer. That is an issue that, to a great extent, is before the courts at this time. It is important, but it is not central to what we are talking about in this legislation. And I know it will be brought up and thrown around a good deal as being the central part of this legislation. It is not.

I do not understand that your arbitrators are going to be involved in this nor do I see the administrative law judges being involved in it.

Senator HATCH. Mr. Chairman. Would you then, Ted, support an amendment that would make this clearer so that it would not be misconstrued? Because it seems to me we don't want to get into integration maintenance in this bill. But it is not clear, and you are saying that it surely is not clear and it could lead to these types of disastrous results.

Senator KENNEDY. Yes. I think it could be easily clarified with some wording in the legislation, if you will just sign on to the legislation.

Senator HATCH. I am looking at it very carefully. I support fair housing. What I don't support are things that I think do result in discrimination themselves. I don't support the legal theory. And I don't support a situation that is going to be allowed to depress the whole housing market and maybe take away units from people who really need them, especially the minorities.

And, you know, the fact that I don't support a great big maudlin bill does not necessarily mean that I don't support the aims and the goals that you have. I do support those. But I think we ought to make the bill right, and I am willing to work on that. And I am willing to get on the floor and support it openly. You bet. But I want it right.

I think we ought to clarify the language and we ought to get rid of these type of problems, because they are serious problems that are going to create more litigation, they are going to create more expense to owning and providing housing, they are going to create discrimination against blacks and other minorities, and they are going to create all kinds of expenses and costs to our society that really are not merited. I think we ought to try and clear these things up and not just blandly say everything is good because it has the words "civil rights" imprinted on it. All of us are for civil rights. And all of us want non-discrimination in housing.

My gosh, we ought to be able to clear up these bills when they are not clear. And I think Mr. Reynolds has made a pretty good case. This bill is not clear.

Mr. REYNOLDS. I think that is right.

Senator SIMON. We thank you, Mr. Reynolds.

Mr. REYNOLDS. Thank you, Mr. Chairman.

[The prepared statement of Mr. Reynolds follows:]

STATEMENT OF

WM. BRADFORD REYNOLDS

ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
UNITED STATES DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Subcommittee:

I thank you for the opportunity to present the views of the Department of Justice regarding the important effort to amend the Fair Housing Act. The Administration strongly supports a legislative effort to strengthen enforcement of the existing proscription against discrimination in housing. There can be no doubt that unlawful discrimination continues to pose a significant barrier to many individuals seeking housing in our society. There is also general agreement that while the Fair Housing Act has achieved much good, its enforcement provisions must be strengthened if it is to extend the promise of a colorblind society into the housing market.

The overriding goal of fair housing reform must be to increase the access of individuals to remedies guaranteed by the Fair Housing Act, while preserving procedural fairness for both complainants and respondents in fair housing disputes. Under existing law, an individual whose complaint cannot be resolved through conciliation is remitted to filing a private action in federal court. Because the amount of money at stake in fair housing disputes is generally small, an individual may not find it worthwhile to file such an action. This problem is compounded by the current law's limitation of awards of attorneys' fees to indigent plaintiffs. Thus, we have repeatedly urged Congress to amend the Fair Housing Act to assist individual claimants in pursuing vindication of fair housing claims.

We also have asked Congress to amend the Act to prohibit denials of housing based on an individual's handicap. In recent

years, Congress has expanded the federal role in combatting prejudice against handicapped individuals and we believe that this role should be expanded to encompass housing decisions.

To redress the inadequacies of existing law, the Administration drafted and urged passage of S. 2146 in the last Congress. The Department of Justice is currently working with HUD to produce a proposal for this Congress. We are encouraged that S. 558 appears designed to achieve many of the goals that the Administration has pursued in its past proposals and continues to support.

The Administration, however, continues to oppose S. 558's creation of a system of administrative adjudication for fair housing complaints. S. 558 would channel all individual complaints that could not be resolved through informal methods and did not involve an issue of zoning or land use law to an administrative law judge (ALJ). The ALJ would be empowered to award extensive relief, including an injunction and compensatory and punitive damages. The order of an ALJ could be reviewed and enforced by a federal court of appeals.

S. 558, therefore, would authorize, for the first time, binding, administrative adjudication of individual civil rights claims. While we fully support the goal of providing victims of discrimination with speedy, inexpensive and effective redress, we remain convinced that channelling complaints through the administrative bureaucracy envisioned in S. 558 will not serve any of these goals. Because it contemplates sending large numbers of complaints through formal administrative adjudication, including review by a court of appeals, the administrative procedure will not provide speedy or effective relief for individuals who have been denied housing.

Our research demonstrates that administrative law judges simply do not provide speedy resolution of disputes. A survey of government agencies employing administrative law judges or their equivalent revealed the following average times for the pro-

cessing of complaints before ALJ's: the National Labor Relations Board in FY 1986 averaged 767 days (25.6 months); the Social Security Administration in FY 1986 averaged 421 days (14 months); the Federal Labor Relations Authority averaged 467 days (15.5 months); and the Department of Labor averaged 398 days (13.3 months) in black lung cases. These numbers do not include the time required for judicial review of the ALJ's decision. While this survey is not exhaustive, it is representative and demonstrates that ALJ's do not offer a speedy dispute-resolution alternative that can realistically be counted on to provide meaningful relief to an individual who has been denied an apartment because of race and simply wants to be allowed to lease that apartment.

The prospect of so prolonged an administrative review process, with individual relief coming, if at all, so many months later as to be unhelpful to most claimants, suggests no good reason for the creation and maintenance of an expensive new component of the standing federal bureaucracy. Nor does it provide any justification for removing this class of civil rights disputes from courts, where they can be resolved by life-tenured judges pursuant to the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Indeed, the available data indicate that district courts probably do a faster job of resolving housing disputes than would a system of ALJ's. Although data limited to housing disputes are not available, the average processing time for all civil rights cases, excluding employment cases, in federal district courts is 11 months. We know from experience that Housing cases frequently take considerably less time to resolve than other civil rights court actions because they are more likely to be resolved at an early stage of the litigation through consent decree. Indeed, the Division has concluded by consent decree 47 of its 53 litigated cases in the past 3 1/2 years. These cases have taken an average of only 4 months from filing of the suit to final entry of a consent order

and less than 9 months from initial authorization of the suit to such final entry.

For these reasons, the Administration has opposed the creation of a system of administrative adjudication of fair housing disputes. We acknowledge, however, that while court processing remains the appropriate method for "pattern or practice" and zoning cases and those cases of general public importance, it would be desirable to create an alternative method for resolving garden variety disputes involving individuals who just want to rent an apartment or buy a house, but have been met with rejection simply because of race, sex, color, religion, handicap or national origin. The Department of Justice, therefore, has been working with HUD to produce an alternative that can provide relief to these individuals quickly enough to be meaningful.

Our approach envisions a four-pronged assault on housing discrimination. The first resort in every discrimination complaint that arises in a state or locality with an adequate fair housing law should be the state or local authority. The number of States certified by HUD as having fair housing laws substantially equivalent to the federal law has risen since 1977 from 22 to 35 and the number of localities so certified has reached 67. Because existing law requires HUD to refer complaints to these jurisdictions before it attempts to resolve them, the percentage of HUD's complaints handled at the state and local levels has gone from 39% in FY 1981, to 52% in FY 1982, to 60% in FY 1983, to 67% in FY 1984, to 64% in FY 1985, to 69% in FY 1986. These high levels of handling by State and local agencies should continue and counsel against enlarging significantly the permanent federal bureaucracy.

In the absence of an adequate state or local law, responsibility shifts to the federal government to provide individuals with the opportunity for effective redress. The larger and more complex "pattern and practice" cases, as well as land use cases

and matters involving novel legal questions or issues of particular public importance should, in our view, be referred at the outset by HUD to the Justice Department for handling. The Attorney General would retain his present authority to sue for injunctive relief to redress the unlawful conduct in these cases, and he would be authorized to seek additional remedies as well. Specifically, the Attorney General would be empowered to seek civil penalties up to $50,000 against first offenders and $100,000 against multiple offenders and an award of damages on behalf of the aggrieved person.

As to all other matters, we envision, as the third prong of our approach, that if HUD fails to conciliate a dispute within a time certain, the parties will be given a choice between voluntary and mandatory arbitration. We intend to create a streamlined and fast voluntary arbitration option that will give the parties a final resolution of their dispute within a very short, prescribed time. Because the parties will have agreed to the process, it will be possible to simplify the proceedings without running afoul of constitutional constraints. We believe that a process that promises fast, and therefore meaningful, relief will prove attractive to complainants. As an incentive to encourage respondents to participate, we are thinking of limiting the relief that can be awarded by the arbitrator in voluntary arbitration to injunctive relief and attorneys' fees. This would leave the award of punitive damages or large civil penalties as available relief only if the parties proceeded to mandatory arbitration or court.

If the parties do not agree to submit their dispute to voluntary arbitration, the Secretary could initiate mandatory arbitration with the agreement of the complainant. In order to satisfy constitutional requirements, mandatory arbitration will necessarily be a more protracted and formal process than voluntary arbitration, but it is our goal to create a structure under which far more individuals will opt for voluntary than mandatory

arbitration. Mandatory arbitration will involve a hearing on the record, a written, reasoned decision by the arbitrator and the opportunity for judicial review.

And, of course, rather than submit his or her dispute to arbitration, the victim of discrimination would retain the option to file a private lawsuit. The Administration proposal would assist private suits by authorizing awards of attorneys' fees to prevailing parties, lifting the limit on punitive damages and authorizing the award of civil penalties. These private lawsuits would be the fourth prong of our attack on housing discrimination.

This four-pronged approach properly maintains the current law's emphasis on the role of state and local government in combating housing discrimination. As a back-up, it strikes the proper balance at the federal level between judicial and alternative methods of resolving fair housing disputes. It offers an alternative method -- arbitration -- that will prove faster and less expensive than a full-blown administrative process, but continues to send to federal district courts the most difficult cases and those with the broadest impact. There they will be submitted to the full play of our adversary system under the important safeguards of the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and a life-tenured judge. This has been the traditional and highly successful method of adjudicating important individual rights in our constitutional system and should be retained for this important class of cases.

The combination of damages and civil penalties, available both in court actions and mandatory arbitration, will make discrimination even more expensive and should also encourage parties to resolve their disputes through conciliation and voluntary arbitration. We, therefore, believe that this package offers an innovative and the most effective means of strengthening enforcement of the Fair Housing Act.

Both the Administration proposal and S. 558 would prohibit discrimination based on an individual's handicap. While we are in agreement that such protection is long overdue, there are three aspects of S. 558's treatment of this issue that require attention.

(a) We continue to believe that the reasonable accommodation concept that is an element of the Rehabilitation Act of 1973 has relevance to the housing provisions. Individuals with a handicap should not for that reason be denied housing, and all reasonable efforts should be made to accommodate a rental unit to their needs. At the same time, upon leaving the unit, the cost of modifications to return the premises to their prior condition should appropriately be borne by the handicapped individual. Therefore, language is necessary requiring that renters agree in advance to restore the premises to their original condition prior to any modification, reasonable wear and tear excepted. Failure to include such language may well make landlords more reluctant to rent to individuals with handicaps and result in a reduction in property available for occupancy by handicapped individuals.

(b) Although we support the definition of "handicap" in S. 558, insofar as it goes, the following language, which appears in the Administration's proposal, should be added: "but such term does not include any current impairment that consists of alcoholism or drug abuse, or any other impairment that would be a direct threat to the property or the safety of others." These impairments are in our view perfectly acceptable bases for the denial of housing.

(c) We also fail to understand the requirement that modifications be permitted if necessary to provide "equal access" to premises. Presumably, this language refers to access equal to that of individuals without handicaps. The requirement of "ready access" has heretofore been used consistently by Congress in every piece of handicap legislation. It fully meets the needs of persons with handicaps without imposing the unnecessary burden of

insuring that every aspect of a structure is precisely as accessible to persons with handicaps as it is to those without handicaps.

On another aspect of the bill, S. 558 would add "familial status" to the list of grounds upon which housing decisions may not be premised. This addition is apparently designed to prohibit refusals to rent based on occupancy by children living with parents or custodians. No other federal civil rights statute prohibits discrimination based on familial status. Its inclusion in the Fair Housing Act would dramatically extend the reach of the federal government. The consequences of this expansion have not been fully explored. In our view, housing discrimination based on familial status is not so wholly arbitrary that it should drain federal resources from the enforcement effort against more egregious forms of housing discrimination, such as those based on race, color, national origin, sex, religion, and handicap. We believe that the issue of banning housing discrimination on the basis of familial status should be left to States and localities who are in the best position to measure its impact, if any, on a particular housing market. Regardless, we oppose inclusion of discrimination based on familial status in the present, necessary effort to buttress enforcement of the Fair Housing Act. Because we view this expansion as a significant foray into the unknown that should only be taken after considerable deliberation, if at all, we oppose its interjection into the effort to move toward speedy enactment of the strengthening provisions that the Administration supports.

There are a few additional provisions of S.558 that seem to us ill-advised.

(i) Section 7(a)(1) adds an open-ended and vague statement of responsibilities to unnamed federal agencies. As worded, we think this provision is problematic.

(ii) Section 7(a)(2) is in our view duplicative and unnecessary: HUD and the Department of Justice, as the chief enforcement agencies, are able to ensure that federal agencies administer housing programs and activities in a nondiscriminatory manner. Moreover, each agency is already obligated under the cross-cutting civil rights statutes to enforce nondiscrimination in programs or activities receiving federal financial assistance and the Department of Justice coordinates enforcement of all of these cross-cutting statutes except the Age Discrimination Act of 1975 (the Department of Health and Human Services coordinates enforcement of this statute).

(iii) Section 7(b)(1)(B) imposes a new requirement that HUD provide financial assistance to public and private entities that work to eliminate housing discrimination. The bill does not designate the amount or form of such assistance. The Administration opposes this undefined and open ended new funding initiative. Financial assistance is already provided to public entities under Section 816 of the Fair Housing Act and the Administration's proposed separate Fair Housing Initiatives Program would provide new financial assistance to private entities.

(iv) Section 7(b)(1)(C) requires HUD to greatly expand its role in identifying low income housing for individuals, including the establishment and staffing of new offices and the provision of financial assistance to private groups and public institutions for this purpose. Creation of this additional funding obligation will entail the shifting of financial responsibility for these activities from the private sector and State and local bodies to the federal government. We question whether the proposed predicate has yet been laid to warrant so dramatic a shift in the funding obligation.

(v) Section 7(b)(1)(G) imposes substantial new reporting obligations on HUD. It is our view that these obligations would result in additional expense and paperwork that appears wholly unnecessary.

(vi) Finally, section 813(f) of the statute creates a new cause of action against federal officials for failure to administer programs in a manner that affirmatively furthers the purposes of the Fair Housing Act. We are concerned with this sort of provision for a very practical reason. Federal officials must be afforded discretion to administer the Act without the threat that any citizen who disagrees with a specific action will challenge it in court pursuant to the potentially open-ended contention that the action does not affirmatively further the purposes of the Act. Such litigation -- much of which would undoubtedly prove frivolous -- would likely over-burden federal officials and distract them and federal resources from actual enforcement activity to defending particular enforcement decisions. We believe more thought should be given to these consequences before including such a provision in the legislation.

In conclusion, however, I am encouraged by the similarity of the goals and approaches to strengthening the Fair Housing Act that both the Administration and members of this body are pursuing. I look forward to working with members of the Subcommittee to enact legislation that will accomplish these shared goals.

Senator SIMON. Next we will hear from a panel, Barbara Anderson of Cleveland, OH; Laetitia Pferdehirt, Pittsburgh, PA; Dianne Betsey, Silver Spring, MD; and Michael Wilson of St. Petersburg, FL.

We will follow the 5-minute rule on testimony. We will enter the full testimony of all the witnesses in the record, and then limit your informal statements to 5 minutes. Then we will move on to questions.

Ms. Anderson.

A PANEL CONSISTING OF BARBARA ANDERSON, CLEVELAND, OH; LAETITIA H. PFERDEHIRT, PITTSBURGH, PA; DIANNE BETSEY, SILVER SPRING, MD; AND MICHAEL WILSON, MEMBER, PUBLIC POLICY COMMITTEE, NATIONAL MENTAL HEALTH ASSOCIATION

Ms. ANDERSON. Thank you.

In November 1982, my husband and I——

Senator SIMON. Just a moment.

Ms. ANDERSON. Sure.

Senator SIMON. If we can have order here, please. Please proceed.

Ms. ANDERSON. Thank you.

In November 1982, my husband and I purchased a home in Greater Cleveland's Slavic Village section, a predominantly white community. Even before our family moved in, a girl friend and I visited the home. After being there for about 45 minutes, we left the house and got into her car. Immediately a police car turned on its lights and siren, and rolled up to the car. The police ordered us out of the car. They instructed me to go back into the house, and my friend to get into the car, into the police car. They ran a check on the car, determined that my friend had an outstanding parking ticket, and arrested her. The policeman that accompanied me to the house stated that he had received reports that my family and I had taken rifles into the house. He asked permission to search the house, and I refused.

Shortly after moving into the house, we began to receive threatening phone calls that were filled with obscenities and racial slurs. Our mail was repeatedly taken from the box, torn up, and thrown in the yard making it necessary for me to get a post office box.

On July 1, 1983, at 3 a.m., fires were set at all three exits, the front, side and back doors of our house. Fortunately, my husband and I and our four children escaped without injury. Upon investigation, the Cleveland Fire Department determined that an incendiary device was used to ignite the home. That day, someone called and started laughing when I picked up the phone, and in your complete statement, it tells of the racial slurring joke that was told.

On July 4, another fire was set to our back porch which totally destroyed that entire area. On July 17, a fire was set to our two-car garage which partially destroyed it and, 3 days later, on July 20, another fire was set that totally destroyed it.

In November 1983, the phone calls intensified. A rock was thrown through our kitchen window, which hit my 12-year-old daughter in the head and caused her to have several stitches.

In January 1984, discarded Christmas trees and other Christmas debris were dumped into our yard.

In June 1985, Mabel Gant, a 68-year-old black woman, who also lived in Slavic Village, was killed when a fire bomb was thrown through the window of her home. After that, we received repeated calls with threats to our lives.

In June 1986, Madeline Armstrong's family moved into a home on West 88th Street, which had been rehabilitated by the Cleveland Metropolitan Housing Authority. A violent confrontation that followed gained national media attention. After this incident, we also received numerous threats to our lives.

My children, when attending school, one of the youths of a white gang pulled a shotgun on all our kids. One of the girls ran to a public telephone and called their father. The youths took off as soon as my husband pulled up.

In spite of all that we have suffered, and that the children have suffered, we do not want to move. We have a right to live where we want to live. There would be something degrading about the thought of just saying, okay, you win, we lose.

I am here today to urge the swift passage of the Federal Fair Housing amendments that are before this committee. Throughout our entire ordeal, we have really had nowhere to turn. The bill calls for administrative law judges to swiftly enforce the Federal Fair Housing amendments which would give victims of housing discrimination and racial violence direct access to justice.

Mabel Gant's murderer is still free. So are hundreds of perpetrators of racial violence throughout the country who will continue their criminal deeds. Their victims left to fend for themselves are powerless.

We need America to stand up for us and to stand behind us until justice is achieved.

Thank you.

[The prepared statement of Ms. Anderson follows:]

STATEMENT BY:

Barbara Anderson

HEARINGS BEFORE THE JUDICIARY SUBCOMMITTEE THE CONSTITUTION

In November, 1982, we purchased a home in Greater Cleveland's Slavic Village section, a predominantly white community. Even before moving in, a girlfriend and I visited the home. After being there for about 45 minutes, we left the house and got into her car. Immediately a police car turned on its lights and sirens, and rolled up to the car. The police ordered us out of the car. They instructed me to go into the house and my friend to go into the police car. They ran a check on the car, determined that my friend had an outstanding parking ticket, and arrested her. The policeman that accompanied me to the house stated that he had received reports that my family and I had taken rifles into the house. He asked to search the house, I refused.

Shortly after moving in the house, we began to receive threatening phone calls that were filled with obscenities and racial slurs. Our mail was repeatedly taken from our box, torn and thrown on the yard, making it necessary for me to get a post office box.

On July 1, 1983, at 3 AM, there was a fire set at all three exits (front, side and back doors), of our house. Fortunately, my husband and I and our four children escaped without injury. Upon investigation, the Cleveland fire department determined that an incendiary device was used to ignite the home. That day someone called and started laughing when I picked up the phone, and then said, "How can you tell when a nigger is burnt? Because he's crispy brown."

On July 4, at 11:30 PM, a second fire was set to our back porch which totally destroyed that entire area. On July 17, a fire was set to our two-car garage, which partially destroyed it, and then again, on July 20, which totally destroyed the garage and our car. The same day of both fires, people called to say things such as "We're going to get you even if we have to burn your whole house down."

In November, 1983, the phone calls intensified. Someone threw a rock threw our kitchen window, which hit my 12-year-old daughter in the head. The wound required several stiches. That same month our insurance company cancelled our home insurance at the same time that we received a settlement from them of $17,000.

In early January, 1984, discarded Christmas trees and other Christmas debris were dumped onto our yard. Once, when returning from a neighborhood store, my husband and I heard a neighbor shout, "Hand me the rifle, I'm going coon hunting, there's two niggers out here." Starting around that time, when I walked to the bus stop to go to work, residents of the neighborhood frequently yelled out there windows or from their cars, such remarks as "Are you still here, nigger?", and "We'll get you yet."

Our children suffered, also. They were harrassed so much walking to and from school that we ended up having to drive them.

In June, 1985, a firebomb was thrown through the window of the home of Mabel Gant, a 68-year-old black woman who also lived in Slavic Village, killing Mrs. Gant. After her death we began to receive phone calls all hours of the day and night, from callers saying such things as, "We got that other nigger out and we'll get you out, too." "You're not safe and neither are your children. We know where you are." These phone calls continued for at least a month.

In August, 1985, someone threw a Molotov cocktail into our yard, once again setting the back porch on fire. Shortly after, someone broke all our basement windows. Several times that summer, garbage was thrown all over our yard.

In September, 1985, my terminally ill sister moved in with us. She is the mother of four young children, and they visited often. As her illness advanced she could no longer walk, and people would constantly run up on the porch, bang loudly on the front door, startling her, and then run away. She also received many of the threatening phone calls. In November, 1985, her children moved in with us, and immediately became the victims of racial harrassment in the neighborhood. After Christmas of that year, trees and debris were once again dumped in our yard.

In June, 1986, Madeline Armstrong's family moved into a CMHA rehabilitated home on W. 88th Street which incited a near racial riot that gained national media attention. After this incident, we received numerous phone threats to our lives. We were told if anyone injured during the West 88th Street shooting died, we would be killed.

In January , 1987, five of our children were headed for the bus stop to go to school when several young white males approached

them and began calling them names. One of the youths pulled a shotgun, and all our kids ran. One of our girls ran to a public phone and called her father. The youths took off as soon as my husband pulled up. A few days later, my daughter was returning from a track meet at her school when she was approached by three white males who threatened to rape her if they ever saw her in that area again.

All these experiences have, of course, changed our lives. We now have regular fire drills in the house. We also have special verbal codes signifying danger (fire, someone's in the house, etc.) Our freedom of movement has been reduced to certain prescribed routes to school, the store, etc., so just in case someone doesn't show up, we know where to look for them.

It's been a tremendous financial strain for us, because of the loss of insurance and the continual attacks on the property. For our personal safety we had a fence put up that cost $1,500. The vandalism cost us more than $10,000, since the insurance settlement.

It's been particularly hard on our children. They have been deprived of the normal neighborhood friendships that are usually so much a part of childhood.

In spite of all we have suffered, and that the children have suffered, we surely won't move. We have a right to live where we want to live. There would be something degrading about the thought of leaving our home -- of saying, "okay, you win, I lose." We will stay and weather the storms. Fortunately, I have the confidence in myself and my family to know that we can weather the storms, and that ultimately we will win.

I am here today to urge the swift passage of the federal Fair Housing Amendments that are before this committee. Throughout our entire ordeal, we really had nowhere to turn. The bill calls for administrative law judges to swiftly enforce the federal Fair Housing Amendments which would give victims of housing discrimination and racial violence direct access to justice. During our ordeal, my husband and I called every resource we could think of, with few results. We certainly would have taken advantage of the administrative law judge process.

I think it is the role of the federal government to communicate to states cities and communities throughout the country that people have an absolute right to live without harrassment and fear in any neighborhood they choose. I have no doubt that the local presence of a totally objective enforcer of federal housing law will get across to both perpetrators and victims of residential discrimination and violence that these actions will no longer be committed with impunity.

Mabel Gant's murderer is still free. So are hundreds of perpetrators of racial violence throughout the country, who will continue their criminal deeds. Their victims alone cannot stop them.

Senator SIMON. Thank you, Mrs. Anderson, for an excellent statement. And I hope we can stand up for you.

Ms. Pferdehirt.

STATEMENT OF LAETITIA H. PFERDEHIRT

Ms. PFERDEHIRT. Good morning, gentlemen. My name is Laetitia Pferdehirt, but I am better known as Tish. And I would like to tell you a little bit——

Senator SIMON. Would you pull the microphone just a little closer to you there.

Ms. PFERDEHIRT. Certainly.

As I said, my name is Laetitia Pferdehirt, but I am better known as Tish. And I would like to take this opportunity to tell you a little bit about myself.

At the age of 5, I contracted polio during one of the major epidemics facing the United States. Initially I could only move my eyes. Thanks to being one of the first patients on a "rocking bed," I escaped an iron lung. However, 6 months later, my family faced another situation, and that was my father died in a driving accident.

The next 2 years I spent undergoing physical and intense medical treatment. I was discharged at the age of seven in a wheelchair. My mother was told that she would be lucky if I learned to feed myself.

Today, although I am still totally confined to a wheelchair and am a quadriplegic, I have accomplished that first goal, and a few others.

I graduated from the University of Pittsburgh in 1967, being the second woman in history of that university to do so. At the time there were no ramps, no accessible ladies rooms, limited services, and numerous transportation problems. Even so, I completed my bachelor of arts degree in sociology.

While I hesitated to continue my education, the University of Pittsburgh offered me an opportunity for a scholarship to study a relatively new field, that of vocational rehabilitation counseling. And so I began school once more. I faced, however, the same issues of accessibility in that my intern and practicum positions were at local hospitals because they were accessible. With the aid, however, of enthusiastic and supportive supervisors, and my classmates, I obtained my master's degree in 1969.

The next goal was finding my first job. After applying for several openings, I was offered a counseling position at the Vocational Rehabilitation Center. To this day, with the daily assistance of my coworkers for my personal needs, I have been employed on a full-time basis for 18 years. During that time, I have become aware of numerous disabled persons that had to deal with some of the same frustrating situations I encountered. Often their problem is that they just did not have the resources I did. These included an understanding and supportive family, friends who bothered to help me, and connections that made the impossible possible.

My peers honored me a few years ago with an honorable mention in the Pennsylvania Counselor of the Year Award. Two years ago, I was elected treasurer of the 200-member Pennsylvania Reha-

bilitation Counseling Association, and am presently a board member of the Allegheny Accessibility Coalition.

This is not the first time that I have exposed my history for others to view. As a youngster, I was one of the March of Dimes poster children and labeled "crippled." Who would have thought that, years later, I would be employed, drive my own van, be married, and looking forward to traveling with my husband.

I am still often faced with frustrating situations and still require assistance in activities of daily living. The future holds promise.

While I anticipated that life would consist of a series of barriers, a serious one for me, and certainly for thousands of disabled Americans, is the lack of accessible barrier-free housing.

Approximately 5 years ago, my mother, who spent her life caring for me, became seriously ill. Thanks to an understanding employer and good friends, I was able to continue my employment by residing at the facility where I worked until I could find housing and an attendant. This proved much more difficult than I expected.

As it turned out, an attendant became available quicker than an apartment. And this surprise me because initially I felt that the attendant would be the real problem.

To locate housing, I contacted the private realtor close to my place at work. However, when I visited the building, the two-bedroom apartment that I was interested in proved inaccessible because I could not turn into either of the bedrooms as the hall was too narrow. I did notice, however, that the living room wall was adjacent to the first bedroom. I took an architect with me to assure the building supervisor that a doorway could be cut into the drywall without damaging the property or the structure. I indicated to the realty office at the time that I would sign a contract guaranteeing to pay for the doorway to be cut into the wall, and to return the wall to its original appearance before I left their building. At that point, I was told by the realtor that the owner would not rent to me because of city fire regulations.

Senator SIMON. We are running short of time. Can you summarize the balance of your statement?

Ms. PFERDEHIRT. Certainly.

Senator KENNEDY. Mr. Chairman, could I just—I am reluctant to interrupt. I am going to have to leave, but I want to just personally express my appreciation to our panelists. These are not easy descriptions or stories to relate and tell. But I think what you are demonstrating very clearly is that this legislation is about people, real people. And your testimony is enormously valuable and helpful to us.

I apologize to our other witnesses that I will not be here, but I will look forward to going through their testimony, and I want to personally express my appreciation to all of them for coming here.

And thank you, Mr. Chairman, for this hearing.

Senator SIMON. We thank you, Senator Kennedy, for your leadership in this whole field.

Unfortunately, we have some other meetings that we have to get to, and we have a number of witnesses we have to go through yet. So we would appreciate it if you would summarize.

Ms. PFERDEHIRT. I understand.

In summary, the point I really want to make is that sometimes, attitudinal barriers are even more difficult to overcome than structural barriers, and this is the problem that I ran into in housing.

It finally came down to the point that the realtor would not rent to me just because he did not choose to have a person in a wheelchair in his building. In fact, he even told the president of my agency that he was not interested to leasing to "a deadbeat in a wheelchair."

I finally solved my problem. I did get into an apartment, but it proved to be a lot more expensive than I really could afford.

And, in summary, what I want to say is that the barriers of the world are many and varied for everyone. But I think especially for the handicapped.

Thank you for letting me have this opportunity to describe some of the ones that I faced and, hopefully, with your help, I and countless other disabled individuals may not have to face so many in the future.

Thank you.

[The prepared statement of Ms. Pferdehirt follows:]

TESTIMONY BY
LAETITIA H. PFERDEHIRT
BEFORE JUDICIARY COMMITTEE
APRIL 7, 1987

My name is Laetitia H. Pferdehirt and I would like to tell you a little bit about myself.

At the age of five, I contracted polio during one of the major epidemics. Initially, I could only move my eyes. Thanks to being one of the first patients on a "rocking bed", I escaped being placed in an "iron lung". However, six months later, my family faced another blow when my father died suddenly in an accident. The next two years were spent undergoing physical therapy and intense medical treatment. I was discharged in a wheelchair. My mother was told "you'll be lucky if your daughter learns to feed herself".

Today, although I am still totally confined to a wheelchair and a quadriplegic, I have accomplished that first goal of feeding myself. Subsequently, I have achieved other goals as well. I graduated from the University of Pittsburgh in 1967. There were no ramps, no accessible ladies rooms, limited services and transportation problems. Even so, I earned my B.A. in Sociology. While I hesitated to continue my education, the University of Pittsburgh offered me a scholarship to study a relatively new field, Vocational Rehabilitation Counseling. I soon discoverd that the discipline of rehabilitation centered on my basic beliefs and so re-entered school. Again, issues of accessibility became evident. All of my practicum and internship positions were at local hospitals because they were accessible. With the aid of enthusiastic and supportive supervisors, and my fellow classmates, I obtained a Master's Degree in 1969.

The next goal was finding my first job. After applying for several openings, I was offered a counseling position at the Vocational Rehabilitation Center. With the daily assistance of my co-workers for my personal needs, I have been employed on a full-time basis for 18 years. During that time, I have been aware of numerous disabled persons who have had to deal with some of the same frustrating situations I encountered. Often, their problem is that they did not have the resources I had. These include an understanding and supportive family, friends who "bothered" to help me and "connections" that can make the impossible possible.

My peers honored me a few years ago with an honorable mention in the "Pennsylvania Counselor of the Year Award". Two years ago, I was elected Treasurer of the two hundred member Pennsylvania Rehabilitation Counseling Association and am presently a board member of the Allegheny Accessibility Coalition.

This is not the first time I have exposed my history for others to view. As a youngster, I was one of the March of Dimes poster children and labeled "crippled". Who would have thought that years later, I would be employed, drive my own van, be married, and looking forward to travel? While I am still often faced with frustrating situations and still require assistance in activities in daily living, the future holds promise.

While I anticipate that life will consist of a series of barriers, a serious one for me and I'm certain for thousands of disabled Americans, is the lack of accessible, barrier free housing.

Approximately five years ago my mother, who spent her life caring for me, became seriously ill. Thanks to an understanding employer and good friends, I was able to continue my employment by residing at the facility where I worked until I was able to find housing and an attendant. This proved much more difficult than I expected. As it turned out, an attendant became available much quicker than an apartment, which surprised me. Initially, I felt that an attendant would be a real problem.

To locate housing I contacted a private realtor close to my place of work. However, when I visited the building, the two bedroom apartment I wanted proved inaccessible because I could not turn into either of the bedrooms as the hall was too narrow. I noticed that the living room wall was adjacent to the first bedroom. I took an architect with me to assure the building supervisor that a doorway could be cut in the dry wall without damaging the property or its structure.

I indicated to the realty office that I would sign the contract guaranteeing to pay for the doorway and to return the wall to its original appearance before I left. At that point, I was told by the realtor that the owner would not rent to me because of city fire regulations. I contacted the office of the Fire Inspector who indicated that this was not true. Even so, the owner refused my application. Finally, thanks to the President of the organization I work for, who indicated a willingness to co-sign a lease, I found another apartment and four months later moved in. Unfortunately, because I was not eligible for section 8 housing (as I was employed), I had to spend $600 a month just for rent.

A few years later, the President of our organization informed me that the reason he was asked to co-sign my lease was to reassure the owner that I was not a "dead beat in a wheelchair". He didn't want to evict a person in a wheelchair and wanted assurance that I would not "picket" his building or cause him any public embarrassment.

Sometimes attitudinal barriers are even more difficult to overcome than architectural ones. I can recall some recent situations that confronted the disabled persons I work with. For instance, the Downs Syndrome client who has waited over a year and a half to learn whether he's eligible for Section 8 housing. And, the deaf person who was denied an apartment because he owned a "hearing dog" and the lease would not permit "pets" nor would the landlord permit the installation of signal lights in case of a fire. Finally, the blind girl who was multiply handicapped; she was mildly mentally retarded who wanted to rent an apartment with a girlfriend who was sighted and non-handicapped. She was refused based solely on her appearance and presently is residing in a shelter and has been there for a year.

The barriers of the world are many and varied for everyone, but especially for the handicapped. Ladies and Gentlemen, thank you for letting me have this opportunity to describe some of the ones that I have faced. Hopefully, with your help, I, and countless other physically disabled persons may not have to face so many housing barriers in the future.

Senator SIMON. We thank you very much.
Ms. Betsey.

STATEMENT OF DIANNE BETSEY

Ms. BETSEY. My name is Dianne Betsey. I was the lead complainant in a title VIII—racial discrimination in housing—case that took 6 years to settle. The suite involved a 20-story apartment building in Silver Spring, MD, where there were about 20 apartments on every floor. The majority of the people who lived in the building were white; the majority of the people who lived in the building who had children, about 70 families, were black, Hispanic, Asian, and white, 16 families.

The owner of the building decided that the building would become all adults and attempted to evict all of the families with children. He did. And by doing so, reduced the minority population in the building from 30 to 19 percent.

It took us 6 years to come to an out-of-court settlement on this case; that is about 2,200 days. The attorneys on both sides spent approximately half a million dollars fighting this case. And we were not able to save the homes of the 70 families. We took this case originally to the Federal District Court where the judge ruled against us. We had to go to Fourth Circuit Court in Richmond before we could get the Federal judge's opinion overturned.

If, as I say in my statement, the bill before you, S. 558, had been passed in 1980, we might have been able to resolve our case in 2 years, as opposed to 6 years, the kind of money that was spent on attorney fees would not have been spent, and the 70 families—who were forced to move out of their homes anyway—would have been able to keep their homes.

That is basically it.

[Prepared statement of Ms. Betsey follows:]

PREPARED STATEMENT OF DIANNE BETSEY

TO THE SENATORS AND MEMBERS OF THE 100TH CONGRESS, 1ST SESSION

S.558

REGARDING A BILL TO AMEND TITLE VIII OF THE ACT COMMONLY CALLED THE CIVIL RIGHTS ACT OF 1968 - THE FAIR HOUSING AMENDMENTS ACT

Dear Senators,

Thank you for giving me this opportunity to address this hearing. My testimony follows on pages 2, 3 and 4. It is my hope that this proposed bill, if enacted, will save future victims of racial discrimination in housing the time, expense and displacement that my family along with 69 others suffered seeking relief from discrimination under the existing Title VIII process. I can assure you that had it not been for the Washington Lawyer's Committee for Civil Rights Under Law and the Metropolitan Washington Housing and Planning Association, there never would have been a Betsey Vs. Turtle Cree.

Thank you,, again.

Sincerely,

Dianne Betsey

April 6, 1987

In 1980, I became the lead complainant in the lawsuit know as Charles and Dianne Betsey, et. al., vs. Turtle Creek Associates, et.al. At that time, I lived in a 20 story building, known as building 3 in a three building apartment complex known as The Point, in Silver Spring, Maryland. The complex had been recently purchased by a Boston based firm name Turtle Creek Associates, managed by Krupp Associates.

Almost from the moment the new owners took over, it seemed the non-white tenants - mostly black - were under attack. There were multiple unjustified rent increases, teenagers were being arrested on trumped-up cases that were ultimately thrown out of court, adult tenants found their car windows smashed in, or their tags missing from their cars, school aged children were forbidden to enter the building in groups, but were made to enter one at a time using their keys, or they were not able to open their family's mail boxes without being questioned by building guards, who were off-duty police officers. One incident of harassment was investigated by Mr. Kolbicka of the Federal Bureau of Investigation, and the black, single female head of household ultimately filed an individual case against Krupp Associates with the Montgomery County Human Relations Commission.

In this atmosphere, Krupp Associates began issuing eviction notices to families with children, informing them that building 3 had been declared an all-adult building. There was panic in the building. I made a quick survey of the tenants in the building and discovered that most of the tenants were white, but most of the tenants with children were black, hispanic or Asian. I gave the results of my survey to Mr. Scanlon of the Washington Lawyers' Committee for Civil Rights Under Law. Mr. Scanlon met with the Krupp brothers several times trying to persuade them not to evict the families in our building, but the Krupp brothers refused to listen.

Altogether there were about 70 families with 107 children. I convinced 40 of these families to join me in a lawsuit against Krupp Associates, charging racial discrimination in housing. On July 21, 1980, the Lawyers' Committee filed Betsey vs. Turtle Creek in Federal District Court in Baltimore.

Despite the filing of a lawsuit, the harassment of black tenants continued. I joined with a group of ten other parents, and we began mailing letters to every organization we could think of that might help the families at The Point's building 3. I recall we wrote to Suburban Maryland Fair Housing, the director of the Montgomery County Human Relations Commission, the County Executive, the local chapter of the NAACP, Congressman Barns and many others. All responded saying they could do nothing, because our case was in litigation. We also filed individual complaints with Housing and Urban Development (HUD). A representative of HUD visited us and took our statements. Eventually a HUD

representative met with one of the Krupp brothers and our attorney, Mr. Scanlon. The meeting accomplished nothing. Mr. Krupp simply refused to cooperate or answer any questions, and HUD was powerless to take any action.

By Christmas 1980, I was exhausted from dealing with TV and newspaper reporters, depositions, tenants complaints and walking up and down the stairs counting tenants and their children.

In February, 1981, our hearing began in Judge Norman P. Ramsey's court. Parents testified to incidents to harassment, ex-employees of Krupp Associates testified that they had been told by their employer, Krupp, to increase black tenants' rent higher than white tenants' rents were being raised. A HUD representative testified that the Krupp brothers refused to answer his questions, when he tried to investigate. The testimony took about seven days. In April of 1981, Judge Ramsey ruled in favor of the Krupp brothers.

Again, panic hit building 3 at The Point. There were moving vans at the back door of the building almost daily. I went from apartment to apartment trying to get tenants to stay in their apartments and join me in an appeal to a higher court. Of the forty families who were part of the lawsuit filed in Federal District Court, only 19 agreed to join an appeal. The rest moved out.

In January of 1982, Krupp's lawyers had the ten families appear before Judge Miller in Maryland State Court. At that time, Judge Miller agreed to allow the families stay pending an injunction from Fourth Circuit Court. The families were granted the injunction by a Judge Haynsworth in March, but in April, Judge Haynsworth lifted the injunction without explanation and Krupp's lawyers again had the ten families appear before Judge Miller in Maryland State Court. On May 1, Judge Miller gave the families 30 days to move out. On June 1, 1987, the balance of the families moved from The Point. Montgomery County Schools closed that year on June 18.

When the last families pulled away from The Point, the non-white population dropped from 30% to 19%. Of the 70 families who had lived in building 3, 16 were white, while 54 were black, hispanic or Asian. Some families were able to find accommodations in the same school district, but many more were not. Of this group there were 10 white students that had to begin school that Fall in a new school, and about 47 black students had to begin school that Fall in a new school. Of this last group, 8 students spent their senior year of high school in a new school.

Over the following two years, the ten families that agreed to appeal Judge Ramsey's ruling continued to meet on a regular

basis. We filed our appeal with the Fourth Circuit in Richmond and made the adjustments to our new homes.

During that time, I became a member of Suburban Maryland Fair Housing, where we worked on a bill to ban all-adult housing in Montgomery County and introduced it to the City Council. The Council, in February 1984, passed a law forbidding landlords to adopt an all-adult policy, after that date. This bill had the effect of protecting or "grandfathering" landlords who already had an all-adult policy, including Krupp Associates. Also, during this period, the Montgomery County Human Relations Commission finally made a ruling in the case of the complainant whose harassment case had ben investigated by the FBI. Since the complainant had been part of a lawsuit that was lost in Federal District Court, the Human Relations Commission found no evidence of racial discrimination and found in Krupp's favor.

In the summer of 1984, the Fourth Circuit Court overturned Federal Judge Ramsey's ruling in Betsey vs. Turtle Creek, and remanded the case back to him, with guidelines. The other families on the appeal and I waited almost a year to return to Judge Ramsey's court. We were told that Judge Ramsey's calendar was full. In the Spring of 1985, our attorney informed us that Krupp Associates wished to settle out of court. We had many meeting with our attorney, but could not reach an agreement. In the Spring of 1986, with the help of a mediator provided by Judge Ramsey, we agreed to a settlement, largely because we were tired of fighting. We signed the settlement papers in July, 1986.

If the Fair Housing Amendment being considered here had been passed in 1980, an Administrative Law Judge might have been able to save those 70 families' homes. The 31 families who had been a part of the Federal lawsuit, but who did not become part of the appeal, might have had a ruling of punitive damages with the rest of us. Damages could have been granted by an Administrative Law Judge. All 70 families might have gained relief in a period of 2 years maximum, if the Fair Housing Amendment had been law in 1980.

Frances Delaney

Senator SIMON. Thank you very, very much, Ms. Betsey.
Mr. Wilson.

STATEMENT OF MICHAEL WILSON

Mr. WILSON. Mr. Chairman, thank you for this opportunity to appear before you and your committee on this most important bill.

My name is Michael Wilson. I am speaking today on behalf of myself and other consumers of mental health care who have encountered discrimination in their attempts to find housing.

I am also here on behalf of the National Mental Health Association on whose public policy committee I serve.

NMHA is a citizen's voluntary organization concerned with all aspects of mental disorders and mental health. It was founded in 1909 by Clifford Beers who himself had a serious mental illness. After his recovery, Beers spent the rest of his life creating a nationwide organization whose members would protect the rights of people with mental illnesses, educate the public about mental health and illnesses, and promote research into the causes, prevention, treatment and cure of mental disorders.

The right of access to housing has always been a major problem for people with long-term mental illness. The stigma about the disability is pervasive, and discrimination is expressed too subtly that oftentimes the person with mental illness just does not realize that his rights are being violated. I know that that is true. I am disabled myself. I have epilepsy and I have been classified as being long-term mentally ill. Today, however, I am maintaining well. With the help of medication and good support systems, I live independently in St. Petersburg, FL, and I am very active in community affairs. I serve as a consumer advocate and I have recently been nominated for the Alcohol, Drug Abuse, and Mental Health Local Planning Board.

I am also on the Florida Mental Health Association Board of Directors and on the National Public Policy Committee, as I mentioned before. And I participate in the National Mental Health Consumers Association.

Through my work as an advocate and my years as a consumer, I have seen the discrimination faced by those with mental handicaps over and over. I have experienced the same discrimination myself.

I would like to share with you a few examples of what our experiences have been.

Consider the person who fills out an application for an apartment and answers questions about health status which, in my experience, are typically found on such applications. Then is told that there is no room available after all. Later, he realizes the unit he was applying for is still open and, in fact, it is leased the next day.

Even if the application form itself does not ask about mental illness, there are other ways the landlords may learn of or suspect a disability. A person with mental illness may be a recipient of supplemental security income. They may have gaps in their history about places they have previously lived. Unfortunately, in all these situations, the landlord just does not surmise that you have a mental illness, he also assumes therefore you cannot live alone and will not be a good tenant.

This has happened to me. I have been turned down on applications for apartments, that supposedly were available, several times. I have been turned down when I have been able to furnish information from previous landlords as to my reliability in paying rent, and in my history as a tenant.

I have been sure that the reason is my disability, although that is not easy to prove. Even if I believe that I could prove it, there has been nothing I could do since there have been no protections against discrimination in housing for people who have handicaps.

On one occasion I had to go to the hospital for treatment. My landlord, after he learned where I was, called to tell me that I had to move out, or simply not to come back.

Other people who lived in the building described me as a model tenant and were surprised to hear that I was in the hospital. Needless to say, I still had to move out.

On another occasion my landlord learned of the medications I was taking, and suddenly, two days later I was asked to leave. I objected but to no avail, and I was thrown out. In fact the next day, when I get back to my furniture, it was gone, with no explanation of where it had went. Both times, not because of my inability to pay rent, but simply because of my landlord's knowledge of my illness.

Many people share these stories.

Senator SIMON. I am sorry, but we do have a problem with time. Can you summarize the balance of your statement.

Mr. WILSON. Well, I think the summary goes, that we are concerned about another bill other than S. 558 because that bill would exclude from protection against discrimination 2 million people with epilepsy, 2 million people with mental illness, 4 million people with mental retardation, and the more than 50,000 people, each year, who sustain severe ongoing disabilities as a result of head injuries.

Mr. Chairman, discrimination's true damage is done in the long run. Like a silent stalker which brings a dark shadow of shame to America, it leaves deep scars with its victims and an ugly stain on democracy.

For the mentally ill, it adds still more bricks to the wall of stigma which is far too high to begin with, and this discrimination screams out, without challenge. It is time to challenge, so that we can send this stalker out of our midst. Thank you.

[The prepared statement of Mr. Wilson follows:]

78-076 O - 88 - 13

PREPARED STATEMENT OF

MICHAEL WILSON
MEMBER, PUBLIC POLICY COMMITTEE
NATIONAL MENTAL HEALTH ASSOCIATION

Mr. Chairman, thank you for this opportunity to appear before you and your committee on this most important bill. My name is Michael Wilson. I am speaking today on behalf of myself and other consumers of mental health care who have encountered discrimination in their attempts to find housing. I am also here on behalf of the National Mental Health Association, on whose Public Policy Committee I serve. NMHA is a citizen's voluntary organization concerned with all aspects of mental disorders and mental health. It was founded in 1909 by Clifford Beers, who himself had a serious mental illness. After his recovery, Beers spent the rest of his life creating a nationwide organization whose members would protect the rights of people with mental illnesses, educate the public about mental health and illnesses and promote research into the causes, prevention and treatment and cure of mental disorders.

The right of access to housing has always been a major problem for people with long-term mental illness. Stigma about the disability is pervasive, and discrimination is expressed so subtly that often times the person with mental illness just doesn't realize that his rights are being violated. I know. I am disabled myself. I have epilepsy and chronic mental illness. Today I am functioning well, with the help of medication. I live independently and am very active in community affairs. I serve as a consumer advocate in St. Petersburg, have worked with the state mental health planning council, I serve on the Florida MHA Board of Directors and on the national Public Policy Committee, and I participate in the National Mental Health Consumers Association. Through my work I have seen the discrimination faced by those with mental handicaps over and over; I have experienced that same discrimination myself.

I'd like to share with you a few examples of what our experiences have been. Consider the person who fills out an application for an apartment and answers questions about health status, which in my experience are typically found on such applications, and then is told there isn't any room available afterall. Later he realizes the unit he was applying for is still open and in fact gets leased the next day. Even if the application form itself does not ask about mental illness there are other ways that landlords may learn of, or suspect, a disability. A person with mental illness may be a recipient of Supplemental Security Income; they may have some gaps in their history about places they have previously lived. Unfortunately, in all of these situations, the landlord doesn't just surmise that you may have a mental illness, he also assumes that therefore you can't live alone or won't be a good tenant.

This has happened to me. I have been turned down on applications for apartments that were supposedly available several times. I have even been turned down when I have been able to furnish information from previous landlords as to my reliability in paying rent and in my history as a tenant. I have been sure that the reason is my disability, although that isn't easy to prove. Even when I have believed that I could prove it, there has been nothing I could do since there have been no protections against discrimination in housing for people who have handicaps.

On one occasion, when I had to go into the hospital for treatment; my landlord after he learned where I was, called to tell me that I had to move or not to come back. Other people who lived in the building described me as a model tenant and were surprised to hear that I was in the hospital. Needless to say, I had to move out. On another occasion, my landlord learned of the medications that I was taking, and suddenly two days later I was asked to leave. I objected, but to no avail, and I was thrown out. On both occasions, I was evicted, not because of an inability to pay rent, but simply because of my landlord's knowledge of my illness. The discrimination screams and I hope you hear.

Many people with mental illness share these stories. We are barred from living where we want to. We are both denied initial access and evicted. Sometimes we are victimized in even more subtle ways. For instance, I have had my belongings and money stolen. We may be required to pay higher deposits or offered only units which clearly exceed our ability to pay. Then the denial of housing which is really because of perceived disability can be based on inadequate resources. Once I was forced into a more expensive apartment when the landlord told me that the one I was living in was "no longer available." I was young and still learning how to live with my disability. I didn't know much about rights, but I knew I needed housing, so I took the more expensive apartment.

I, and the many others like me, need the protections and the access to remedies that S.558 would provide. We are concerned, and find it ironic, that a bill has been proposed that would extend coverage only to people with physical handicaps. That bill would exclude from protection against discrimination:

- 2 million people with epilepsy;
- 2 million people with chronic mental illness;
- 4 million people with mental retardation; and
- the more than 50,000 each year who sustain severe ongoing disabilities as a result of head injury.

We urge you to move quickly to assure passage of S.558. I offer my energy and support, and that of the organizations I represent today, to help obtain the rights we have waited too long to claim.

Senator SIMON. I thank all four of you for your excellent testimony. Some times we just hear the statistics and we do not put "flesh and blood" on them. From Ms. Anderson and the terrible experiences you have had, to experiences each of you has had, I think they help to tell the story of the need for moving on this legislation. We are very, very grateful to you. Thank you very much for your testimony.

Our next panel is Hon. Robert Weaver, the former Secretary of HUD, Drew Days of Yale Law School, and Martin Sloane of the National Committee Against Discrimination in Housing.

We are pleased to have all of our witnesses, but Secretary Weaver, you have been a pioneer, and we are particularly honored to have you as a witness here today. I will call on you first.

Let me say again, that we will enter your full statements in the record, and we will follow the 5-minute rule.

A PANEL CONSISTING OF HON. ROBERT C. WEAVER, FORMER SECRETARY, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; DREW S. DAYS III, YALE LAW SCHOOL; AND MARTIN E. SLOANE, EXECUTIVE VICE PRESIDENT, NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING

Mr. WEAVER. At the outset, I want to emphasize my enthusiastic support for the purpose and provisions of S. 558. In the time allocated to me, I shall not attempt a detailed analysis of the proposed legislation. Rather, I will speak of the impact of title VIII, and indicate the adverse national consequences of its deficiencies, analyze briefly why it has not been more effective, identify what I consider the most crucial provisions in the bill may be, and conclude with some historical observations.

Enactment of the Civil Rights Act of 1968, with its title VIII fair housing provisions, had a favorable impact upon minorities.

It and concurrent expansion of the black middle class were largely responsible for significant upgrading of housing for blacks in the 1970's.

Title VIII also provided a more secure legal basis for administrative changes, especially in FHA-insured, VA-guaranteed, and later in other forms of Federal involvement in mortgage credit.

The simple fact that housing discrimination was legally banned caused many of the gate keepers in the industry, as well as individual owners, to reevaluate past practices. It was an identifiable factor in expansion of housing opportunities for minorities in the inner cities.

In most instances, however, the ultimate consequence was an extension of the ghetto rather than significant dispersion throughout metropolitan areas.

More recently, title VIII has been instrumental in breaking the white noose around the suburbs, and thereby enabling substantial suburbanization of blacks in the late 1970's and into the following decade.

As in central cities, resulting residential patterns reflected primarily an expansion of inner city ghettos, this time into some suburbs closest to the city.

In short, fair housing legislation has contributed to spatial mobility of blacks and other minorities, upgrading the quality of their shelter. It has not lived up to its promise of effectively attacking housing discrimination and significantly accelerating integrated patterns of residence.

This failure involves more than quality of living and services. As a consequence of the changing nature of suburbia, and radical structural changes in the economy, it has implications for the economic and social health of the entire Nation.

In recent years, and with continuing intensity, concentration of the dwindling number of entrance jobs for the unskilled, inexperienced, and poorly educated has been in the suburbs.

Lacking knowledge of these existing openings and/or unable to afford transportation to reach them are serious handicaps for young blacks concentrated in central cities where the demand for their labor is constantly declining

As a consequence, a large proportion of them never held a job, and have no prospects of getting one. Movement of corporation headquarters, and more commercial office space, expansion of service industries in the suburbs, remote from concentrations of minority population, have combined with paucity of public transportation to displace trained and experienced blacks from clerical and white-collar jobs they secured with great difficulty a few years ago.

The same fate has faced displaced blacks who formerly earned middle class wages in smokestack industries. Plants continuing operation are often remote from where blacks have access to affordable housing and transportation.

An impressive body of recent research, including a nationwide survey commissioned by HUD in the late 1970's, has documented continuing discrimination and continuing patterns of residential segregation.

One might well ask how this occurred. This, however, is not the occasion for a detailed answer, but recitation of a few basic factors is appropriate. First, racial discrimination in housing has become more subtle. Thus, its existence is more difficult to establish and often quite expensive in terms of time and money expended.

Its victims, however, are all too conscious of its widespread incidence.

Senator SIMON. Mr. Secretary, unfortunately we are facing a caucus a little later on, so that I am going to have to ask you to summarize.

Mr. WEAVER. The single most important need is to strengthen enforcement of authority in HUD, and in this regard I am particularly speaking about the use of administrative judges, as is proposed in S. 558.

Federal action to eradicate housing discrimination has been evolutionary, involving landmark decisions of all three branches of Government. Included are the 1948 Supreme Court decision in *Shelley* v. *Kraemer*, banning judicial enforcement of racial restrictive covenants. President John F. Kennedy's 1962 Executive order, followed by prohibition of discrimination in some types of housing, and urban renewal, set forth in the Civil Rights Act of 1964.

In 1968, title VIII carried the process much further, covering 80 percent of the Nation's housing. But the totality of that change

was effected in two installments over time. So, to amend the title, as this proposed legislation seeks to do, is consistent with the sequential past activities in this phase of public policy.

[The prepared statement of Mr. Weaver follows:]

TESTIMONY

OF

ROBERT C. WEAVER

FORMER SECRETARY OF HOUSING AND
URBAN DEVELOPMENT

At the outset I want to emphasize my enthusiastic support for the purposes and provisions of S.558. In the time allocated to me, I shall not attempt a detailed analysis of the proposed legislation; rather I will speak of the impact of Title VIII of the Civil Rights Act of 1968, indicate the adverse national consequences of its deficiencies, analyze briefly why it has not been more effective, identify what I consider that most crucial provision in the bill, and conclude with some historical observations.

Enactment of the Civil Rights Act of 1968, with its Title VIII fair housing provisions, had a favorable impact upon minorities. It and concurrent expansion of the black middle class were largely responsible for significant upgrading of housing for blacks in the 1970s. Title VIII also provided a more secure legal basis for administrative changes, especially in FHA-insured, VA-guaranteed, and later in other forms of Federal involvement in mortgage credit. The simple fact that housing discrimination was legally banned caused many of the gate keepers in the industry, as well as individual owners, to reevaluate past practices. It was an identifiable factor in expansion of housing opportunities for minorities in the inner city and their access to shelter formerly unavailable to them. In most instances, however, the ultimate consequences was an extention of the ghetto rather than significant dispersion throughout metropolitan areas.

More recently, Title VIII has been instrumental in breaking the white noose of the suburbs, and thereby enabling substantial suburbanization of blacks in the late 1970s and into the following decade. As in central cities, resulting residential patterns reflected primarily expansion of inner city ghettos, this time into some suburbs closest to the city. In short, fair housing legislation has contributed to spatial mobility of blacks and other minorities, upgrading the quality of their shelter. It has not lived up to its promise of effectively attacking housing discrimination and significantly accelerating integrated patterns of residence.

This failure involves more than quality living accommodations and services. As a consequence of the changing nature of suburbia and radical structural changes in the economy, it has implications for the economic and social health of the nation. In recent years and with continuing intensity, concentration of the dwindling number of entrance jobs for the unskilled, inexperienced, and poorly educated has been in the suburbs. Lacking knowledge of these existing openings and/or unable to afford transportation to reach them are serious handicaps for young blacks concentrated in central cities where demand for their labor continued to decline. As a consequences, a large proportion of them have never held a job and have little or no prospects of getting one. Movement of corporation headquarters, construction of more and more commercial office space, and expansion of service industries in suburbs remote from concentrations of minority population have combined with paucity of public transportation to displace trained and experienced blacks

from clerical and white-collar jobs they secured a decade or so ago. The same fate has faced displaced blacks who formerly earned middle class wages in smokestack industries, now increasingly cutting back or closing. Plants continuing operations are often remote from where blacks have access to affordable housing and transportation.

An impressive body of a recent research, including a nation-wide survey commissioned by HUD in the late 1970s, has documented continuing discrimination and continuing patterns of racial residential segregation. Less than a week ago, the New York Times devoted a whole page to the situation in that city. One might well ask how it occurred. This, however, is not the occasion for a detailed answer, but recitation of a few basic factors is appropriate. First, racial discrimination in housing has become more subtile; thus, its existence is more difficult to establish and often quite expensive in terms of time and money expended. Its victims, however, are all too conscious of its widespread incidence. A dramatic example lies in the prevalence of racial steering -- a practice of real estate agents' directing whites exclusively to white occupied areas and blacks to areas of black concentration or past black penetration.

Secondly, the enforcement machinery available to HUD -- primarily conciliation -- is cumbersome and hesitant. In light of complainants' difficulties in assembling documents and witnesses to sustain their charges, the existing 180-day statue of limitations is often a deterrent to seeking relief. The other principal avenue of relief is through court action, which has potential for even greater delay and

risk of incurring heavy expenses or difficulty in securing competent counsel. Involvement of the Attorney General through his bringing a "pattern of practice" suit is problematical and even more long drawn out than the other two approaches.

Recent research presents impressive evidence that the gaps in rates of white and black suburbanization are attributable in no small measure to actual or anticipated discrimination in the housing market, Indeed, the experience or expectation of such treatment deters blacks and other minorities from even looking for housing in some locations.

The single, most important need is to strengthen the enforcement authority in HUD. S.558 does this primarily through establishment of an administrative hearing and decision process. This, of course, is not without precedent since more than two score Federal agencies use such enforcement mechanisms. What is proposed is a proven, speedy, fair, and inexpensive decision process for all parties involved. In my opinion this structure will facilitate more immediate relief and achievement of the primary goal of the Fair Housing Act. HUD's conciliation responsibilities will continue, but when conciliation fails, the Department would file a complaint, before an independent administrative law judge.

This process and the extended coverage provided in S.558 will, I believe, go far in achieving fair housing throughout the United States, the goal the Title set forth in Section 801 of the Civil Rights Act of 1968. As one

involved in the development of that Title, I can assure you that its architects and sponsors did not believe they had written the final word on fair housing. As with most major legislation, compromises were made and concessions effected so as to garner support. The greatest apprehensions at the time were concentrated in the area of enforcement.

Federal action in the area of housing discrimination has been evolutionary, involving landmark actions by all three branches of government. Included are the 1948 Supreme Court decision in Shelley v. Kraemer, banning judicial enforcement of race restrictive housing covenants, President John F. Kennedy's 1962 Executive Order on Equal Opportunity in Housing, followed by prohibition of discrimination in some types of Federally assisted housing and in urban renewal set forth in the Civil Rights Act of 1964. In 1968, Title VIII carried the process much further, covering 80 percent of the nation's housing. But the totality of that coverage was effected in two installments over time. So, to amend the Title, as this proposed legislation seeks to do, is consistent with sequential past activities in this sphere of public policy.

Senator SIMON. I thank you, Mr. Secretary. That was the kind of an excellent statement I would expect from Secretary Weaver.

Professor Days.

STATEMENT OF DREW S. DAYS III, PROFESSOR OF LAW, YALE LAW SCHOOL, YALE UNIVERSITY

Mr. DAYS. Thank you, Mr. Chairman. It is a pleasure for me to be able to testify before the Subcommittee on S. 558.

As you are aware, I served from 1977 to 1980 as assistant attorney general for civil rights in the Carter administration, and have some familiarity with efforts to strengthen the Fair Housing Act of 1968.

I am generally supportive of the direction that S. 558 takes, and I would like to indicate in what respects.

First of all, I would like to agree with Dr. Weaver, that while the Fair Housing Act has obviously made significant changes in our society, it has not done the job that many of us expected it would do.

There are clearly changes in the legislation, and I have identified two in my testimony. One has to do, as I describe it, with "putting teeth" in the administrative enforcement mechanisms in HUD, and, second, giving the Attorney General the ability to obtain full and effective remedies in housing discrimination suits. Neither is the case at this point.

HUD, of course, has the power to seek only voluntary conciliation in cases brought to its attention. There is a lack of coercive power in HUD, and as a consequence, there is very little incentive on the part of violators of the act to comply with its provisions.

Second, the act gives the Attorney General pattern, or practice authority, or authority to bring litigation in cases raising issues of general public importance.

While that might appear on its face to be ample authority for the Attorney General, in fact it turns out to be not very much authority at all.

For one thing, the Department of Justice has been able to bring, to my knowledge, over the years that it has had this authority, only a few dozen cases per year, and I think the evidence reflects that literally thousands of complaints are filed with HUD that have no other recourse but voluntary conciliation or the bringing of private suits.

Even if the Attorney General had the authority to bring suits with respect to those types of cases, I think it would not be possible for the Department of Justice to do this without major restructuring of the Department, and the infusion of resources that I doubt are available.

More particularly with respect to the Attorney General's authority, courts, at least since 1975, have limited the type of relief that the Attorney General can seek, namely, precluding the award of damages for identified victims of discrimination.

So that even where the Attorney General brings and wins suits, it does not mean much for the parties who have been most directly affected. I think S. 558 moves in the right direction in both these respects. The administrative law process which has coercive power

to it, means that HUD does not have to rely solely upon voluntary conciliation.

And with respect to the Attorney General, the availability of civil penalties provides an important tool in the arsenal of the Attorney General, both in terms of actually bringing suits and getting some type of recovery, but I think also in terms of its in terrorem effect, that is, chilling the behavior of those who might find themselves at the end of a Justice Department law suit.

I would like to speak also with respect to the expanded coverage under this proposed legislation, specifically with respect to handicap and familial status.

You have already heard testimony about the burdens that people with handicaps face. I cannot really add to that, but this approach has my wholehearted support.

Second, with respect to familial status, there has been some discussion about the novelty of this provision in Federal civil rights legislation, and that certainly is the case and, I would suggest that the Congress do all that it can to identify the nature of the problem and the justification for Federal action.

I pointed out in my testimony the extent to which there seems to be a correlation between discrimination against families with children and disparate impact upon minority families.

This is true, I would think, because black and Hispanic families are younger than the population as a whole.

In conclusion, I would like to say that while the bill does need some work, it has some deficiencies, I think they are largely of a technical nature, and I would be happy to talk to Subcommittee staff about those concerns of mine, and would be willing to make suggestions on how clarifications and improvements might be achieved.

Thank you very much.

[The prepared statement of Mr. Days follows:]

Testimony of

Professor Drew S. Days, III

Yale Law School

on S. 558

"The Fair Housing Act Amendments Act of 1987"

before

Subcommittee on the Constitution

of the Committee on the Judiciary Senate

April 7, 1987

I want to thank you, Mr. Chairman, and other members of the Subcommittee for inviting me to testify with respect to S. 558, the proposed Fair Housing Act Amendments Act of 1987. It is my recollection that I testified in 1979 about somewhat similar proposals to amend the Fair Housing Act of 1968. At that time, I was serving as Assistant Attorney General for Civil Rights. In that capacity, one of my principal responsibilities was enforcement of those provisions of the Fair Housing Act which authorize legal action by the Attorney General. It was my sense then, based upon my extensive involvement in housing discrimination investigations and litigation around the country brought by the Civil Rights Division, that the enactment of amendments designed to restructure and strengthen enforcement mechanisms in the Fair Housing Act was imperative. I have seen nothing during the intervening eight years that would cause me to change my mind in that regard. Despite the high expectations many of us had for the Fair Housing Act of 1968, experience has taught that the Act, as presently constituted, cannot be an effective weapon in the battle to rid our society of racial and other forms of invidious discrimination in the sale and rental of housing. Indeed, despite efforts by private individuals, civil rights organizations

and federal and other governmental agencies to ensure equal housing opportunity for all, America appears even more residentially segregated today than it was in 1968. See for example, Smothers, "Housing Segregation: New Twists and Old Results," N.Y. Times, April 1, 1987, at B1, col. 5 (describing housing segregation in the New York City area). And some people seem quite committed to ensuring that their communities remain that way, in the face of new governmental programs designed to promote desegregation. See, "Big Shift in Boston Housing Patterns Predicted With New Integration Plan," N.Y. Times, April 5, 1987, at 43, col. 1 (white quoted there as saying, "In South Boston there are no blacks whatsoever. They wouldn't dare try to move in.")

In order to be able to meet effectively the challenges presented by these current conditions, the Fair Housing Act of 1968 must be amended 1) to "put teeth in" its administrative enforcement mechanisms and 2) to ensure the Attorney General's ability to obtain full and effective remedies in housing discrimination suits brought by the Department of Justice. As you know, the Act currently authorizes the Department of Housing and Urban Development (HUD) to engage in conciliation efforts directed toward resolving

complaints of housing discrimination. In the event that the Secretary of HUD is unable to obtain voluntary compliance, the only recourse available to the complaining party is to initiate a private action in federal court. In view of HUD's inability to take any coercive action to obtain compliance with the substantive provisions of the Act and the practical impediments, despite the availability of attorneys' fees to the bringing of individual fair housing suits, it is not surprising that persons charged with housing discrimination have felt little incentive to participate in the conciliation process.

The Act also grants power to the Attorney General to bring a legal action whenever he or she "has reasonable cause to believe" that there has been a "pattern or practice" of fair housing violations or violations of the Act that raise issues "of general public importance." Although the enforcement authority afforded the Attorney General under the Act appears broad on its face, the effectiveness of Justice Department fair housing litigation efforts has been hampered by two factors, one practical and one legal.

The vast majority of the several thousand complaints received yearly by HUD and left unresolved by its conciliation process cannot be characterized as presenting evidence of a "pattern

or practice" of discrimination or as raising issues "of general public importance," rendering them suitable for Department of Justice legal action. But even if one were to assume for purposes of discussion that they did, my experience within the Civil Rights Division tells me that, as a practical matter, the Department of Justice would be able to bring enforcement actions in only a small percentage of such cases without major restructuring of its litigation program or the infusion of significant additional resources earmarked for fair housing enforcement. Indeed, no more than a few dozen fair housing suits have been brought yearly by the Civil Rights Division, irrespective of which administration was in office.

Moreover, even in those cases brought and won by the Division, lower federal courts have, since at least 1975, often resisted efforts by government lawyers to obtain damages for identifiable victims of housing discrimination. See, for example, United States v. J.C. Long, 537 F.2d 1151 (4th Cir. 1975), cert. den., 429 U.S. 871 (1976). I do not think that this state of affairs has changed since I left the Department. Consequently, as a legal matter, the Attorney General is barred from seeking the type of relief

that would be most meaningful, short of getting the housing originally sought which is often impossible, to persons subjected to discriminatory treatment. Of course, the threat of contempt orders provides some measure of assurance that guilty defendants will comply in the future with the Act. But seeking such relief is often a complex, expensive and time-consuming process which makes it only a theoretical alternative in most cases.

In my estimation, the enactment of S. 558 would strengthen immeasurably Fair Housing Act enforcement by both HUD and the Department of Justice. First, the Department of Housing and Urban Development would be able, under the bill's provisions, to take administrative action against those guilty of housing discrimination. I would not need any longer to rely solely upon voluntary compliance mechanisms. Victims of such discrimination could expect to receive compensatory damages, punitive damages and cease and desist orders growing out of the administrative hearing process to be established.

I am aware that when I testified in 1979 some, including myself as spokesperson for the Department of Justice, expressed concern about the strengthening of the administrative process. Specifically, it was feared that the awarding of

monetary relief to victims of housing discrimination might run afoul of Seventh Amendment jury trial requirements. However, it is my sense that what guidance we do have from the Supreme Court on Seventh Amendment and related Article III questions in this context suggests that the administrative enforcement mechanism contained in S. 558 would fall within constitutional limits. Atlas Roofing Co. v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1977) and Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). To the extent that any doubt exists in this regard, it strikes me that the doubt should be resolved in favor, not against, amending the Fair Housing Act to provide this administrative enforcement procedure. For it offers real promise of affording thousands of victims of housing discrimination an effective means for vindicating their rights under the 1968 Act.

Secondly, the Attorney General would be authorized for the first time to seek civil penalties as remedies in Department of Justice fair housing suits. I think that this change would make such litigation and the threat of such litigation far more effective in combatting housing discrimination than is now the case.

Moreover, I would assume that, by making no other changes in the range of remedies that the Attorney General may seek in federal court, S. 558 leaves this issue open for further development in the courts.

Before closing, I would like to go beyond matters of enforcement addressed by S. 558 to address briefly the expanded coverage it proposes. If enacted, S. 558 would amend the Fair Housing Act of 1968 to forbid housing discrimination on the basis of handicap and familial status, the latter addressed specifically to alleviating problems of access to housing faced by families with children.

I want to express my wholehearted support for the addition of "handicap" to the list of forbidden grounds for housing discrimination. Here is not the place to rehearse in detail the problems faced by those in our society with handicapping conditions in obtaining decent, affordable housing. See for example, the discussion of community opposition to group homes for the mentally retarded in City of Cleburne v. Cleburne Living Center, 105 S.CT. 3249 (1985). In any event, I am certain there are others far more qualified to do so than am I. But I can say, based upon the experienced I gained in enforcing certain provisions of the Rehabilitation Act of

APPENDIX III

FEBRUARY 14, 1979.

NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING

MEMORANDUM

(By Martin E. Sloane and Christine L. Owens)

CONSTITUTIONALITY OF HUD ADMINISTRATIVE ENFORCEMENT OF TITLE VIII THROUGH PROVISION OF MONETARY RELIEF TO COMPLAINANTS

Introduction

The draft bill to amend Title VIII of the Civil Rights Act of 1968 would make a number of significant changes in the existing law. These proposed changes are in response to the failure of the Federal Fair Housing Act, which embodies a policy to which Congress has accorded "the highest priority," *Trafficante* v. *Metropolitan Life Ins. Co.* 409 U.S. 205, 211 (1972), to fulfill its great promise of equal housing opportunity. Ten years after enactment of the Fair Housing Act and over one hundred years after ratification of the Thirteenth Amendment discrimination in housing is still commonplace. Thus, the Housing Marketing Practices Survey, recently conducted by NCDH for HUD, found that, black homeseekers who participated in the study encountered discrimination in rentals 75 percent of the time, and in sales, 62 percent of the time.

Without question, the most serious impediment to fulfillment of Title VIII's goal to "provide . . . for fair housing throughout the United States." 42 U.S.C. 3601, has been the lack of adequate enforcement mechanisms. Title VIII presently provides for three means of enforcement: Suits by the Attorney General (42 U.S.C. 3613); suits by private parties (42 U.S.C. 3612); and administrative complaints to HUD (42 U.S.C. 3610). Each of these enforcement mechanisms has serious weaknesses. In combination, they have proved inadequate.

First, suits by the Attorney General are limited to those involving a "pattern or practice" or "an issue of general public importance." They do not provide redress for most individual complainants. Further, the entire responsibility for carrying out the Attorney General's role under Title VIII is assigned to a handful of attorneys constituting one section (Housing and Credit) of one division (Civil Rights) of the Department of Justice. As the Supreme Court realistically acknowledged in *Trafficante*, *supra* at 212, "the enormity of the task of assuring fair housing makes the role of the Attorney General in the matter minimal."[1]

Second, suits by private parties are often time-consuming, unwieldly, and extremely burdensome. This tends to discourage all but those most persistent and steadfast in their determination to exercise rights guaranteed by the statute. In addition, litigation is expensive. This effectively precludes private parties from pursuing this avenue of fair housing enforcement unless they can afford the often high cost of litigation or are able to secure services of pro bono attorneys experienced in fair housing litigation willing to pursue those cases.[2]

As Secretary Harris has concluded: "[A]s a practical matter, many complainants are unable to utilize the right to seek a remedy through the courts, and, therefore, must rely solely on the administrative process. . . ." Proposed Amendments to the Fair Housing Act: Hearings on H.R. 3504 and H.R. 7787 before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 95th Cong., 2d Sess., Ser. 46, at 31 (1978). (Statement of Patricia Roberts Harris)

Third, enforcement through administrative complaints to HUD suffers from the obvious and often fatal, weakness that HUD has no authority to provide any relief to the complaining party, no matter how flagrant the violation nor how

[1] At the time of the *Trafficante* decision, the then Housing Section was concerned only with enforcement of fair housing rights under Title VIII. Since then, its responsibilities (and name) have been expanded to include credit as well as housing, but the staff and other resources available to it have remained virtually the same. Accordingly, the role of the Attorney General in Title VIII enforcement necessarily has become even more "minimal."

[2] The limited number of such attorneys can be appreciated by the fact that the NCDH Legal Program, with four staff attorneys, constitutes the largest single resource devoted exclusively to private fair housing litigation.

1973 during my tenure in the Civil Rights Division, that statutory protection for the disabled against housing discrimination is long overdue.

On the issue of whether the Fair Housing Act ought to be amended to include a prohibition against discrimination on the grounds of "familial status," I have less experience to guide my reaction. However, the fact that several states and localities, I am told, have seen fit to address discrimination against families with children suggests that the problem may warrant congressional action, as well. I also think it significant that there has been some recent judicial consideration of the extent to which discrimination against families with children falls disportionately upon racial minorities. See, Betsey v. Turtle Creek Associates, 736 F.2d 983 (4th Cir. 1984). I would hope that the Congress would make a thorough record in this regard, given that, if I am not mistaken, this would be the first federal civil rights law to include "familial status" as a "protected" classification. Therefore, both courts and administrative agencies charged with enforcing provisions of the amended Act will need, and have a right to expect, the clearest congressional

Senator SIMON. Thank you, and we welcome those suggestions for technical changes.

Mr. Sloane.

STATEMENT OF MARTIN E. SLOANE

Mr. SLOANE. Thank you, Mr. Chairman. I appreciate the opportunity to testify in favor of S. 558. NCDH does strongly support the bill, all the provisions of the bill, including extending coverage to protect handicapped persons and families with children.

I would, in summarizing my full testimony, like to focus particularly on the enforcement provisions of S. 558, in relation to the changes that it would make in existing title VIII.

There is no dispute, I think, that title VIII has been a disappointment over the nearly 20 years since it was enacted, in terms of its goal of ending discrimination in housing.

I think there is also general agreement, that the inadequacies of title VIII can be traced to inadequacies of enforcement.

The goal that the Congress set forth in 1968 of establishing fair housing throughout the United States simply has not been achieved.

Our own view is that this is a national goal established by Congress, and the Federal Government has a heavy responsibility to see that it is carried out. Indeed, of the three enforcement provisions set forth in title VIII, two place heavy responsibility on Federal agencies, one on the Department of Justice, the other on HUD. I will speak a little about those in a second. But the third enforcement mechanism is private litigation, private enforcement. That has been surprisingly successful, measured by the number of law suits that have been brought—and they have been increasing, especially over the last 5 years—the rate of success of those law suits which has also been high, and the amount of damages that have been secured, which have been increasing astronomically.

There have been cases involving six figure damage awards, which are unusual to be sure. But there also have been cases involving five figure awards, which are now not unusual at all.

The success of private litigation can be attributed to the work of some 75 private fair housing centers across the country. They are, I am happy to say, affiliates of NCDH.

They do the investigation, they secure the lawyers, they help victims of discrimination through the complicated judicial process, and since the U.S. Supreme Court decision in *Havens* v. *Coleman* back in 1982, they have standing to bring their own suits.

There are some severe and inherent limitations on private litigation as the main vehicle for enforcement. For one thing, it is a very large country. There are only 75 fair housing groups. They are concentrated in the Northeast, the Midwest, and California.

The Deep South, and the area of the country west of the Mississippi until California, is a virtual fair housing desert. In those areas, victims of discrimination do not have the resources or the help of private fair housing centers. They must get their own lawyers, pay them and do their own investigations. Litigation simply does not work well in these areas.

In addition, many fair housing center directors have told me that court actions, even those involving garden variety cases, can be time consuming, and the courts are clogged, which makes for even more delays.

Third, for victims of discrimination, the court process can be very intimidating, even frightening and they would rather not go into it. And a number of fair housing center directors have told me that they have had great difficulty in persuading victims of discrimination, even in rather egregious cases, to exercise their rights and go to court. Private litigation is not going to be the sole answer.

I agree entirely with my friend Drew Days about the role of the Justice Department. It is an important one. It involves the presence of the United States. Pattern of practice jurisdiction is an important, but limited enforcement instrument. But it is important for the Justice Department to continue to engage in it.

The Justice Department has enjoyed some success, depending upon the vigor and enthusiasm of the particular officials involved.

There are inherent limitations in the Justice Department's role that Mr. Days has referred to. Over the last 3¼ years they have brought a total of 53 cases, which is fewer than 18 a year. Obviously, the Justice Department is not going to be successful in turning around the country in terms of fair housing.

I think their jurisdiction should be continued, and strengthened as this bill does.

The third is another area of Government responsibility, HUD complaints. That has been a failure. But it is not because of any inherent restrictions within the HUD conciliation process.

It lacks the ingredient of enforcement, which this bill will provide. What the bill would do, by providing for administrative enforcement——

Senator SIMON. If you can summarize——

Mr. SLOANE [continuing]. Would not only provide strong and quick enforcement of the Federal Government, but it would make the complaint procedure a credible process.

There will be, I estimate, a manyfold increase in the number of complaints to HUD. They now get fewer than 5,000 a year.

There also would be an even greater increase in the number of successful conciliations, without even getting to the administrative enforcement stage. Also, by making this process credible, it would result in a massive increase, we believe, in voluntary compliance. So that the goal that the Congress set forth of assuring fair housing throughout the country could really be achieved.

Thank you, Mr. Chairman.

[Submissions of Mr. Sloane follow:]

TESTIMONY

OF

MARTIN E. SLOANE

EXECUTIVE VICE PRESIDENT

NATIONAL COMMITTEE AGAINST DISCRIMINATION
IN HOUSING

Mr. Chairman and members of the Subcommittee:

I am Martin E. Sloane, Executive Vice President of the National Committee Against Discrimination in Housing (NCDH). NCDH was among the many civil rights and fair housing organizations that strongly - and successfully - advocated passage of the 1968 Federal Fair Housing Law.

Dr. Robert C. Weaver, a founder and President of NCDH, was Secretary of Housing and Urban Development when the Fair Housing Law was enacted. Among the many legislative achievements during his tenure as HUD Secretary, Dr. Weaver considers passage of the Federal Fair Housing Law to be the most important.

NCDH strongly supports S.558, the "Fair Housing Amendments Act of 1987." It plainly represents needed legislation. Indeed, this is the sixth time in the last 10 years that similar Fair Housing Amendments legislation has been introduced. There is no disagreement that Title VIII badly needs strengthening. Over the past decade the true question has been when will the Congress enact such strengthening legislation. We believe the time is now and S.558 is precisely the bill to accomplish the task.

The plain fact is that Title VIII was, when enacted -- and remains nows -- imperfect legislation. Some of the weaknesses, particularly in the scope of protection, we simply were not aware of at the time and did not come to public attention until later. For example, the failure to prohibit sex discrimination was a serious omission which the Congress wisely corrected in 1974. The prevalence of housing discrimination against the handicapped and against families with children as problems of major nationwide dimensions did not surface until nearly a decade after the Fair Housing Law had been passed. The scope and nature of these forms of discrimination have now been well documented and we are gratified that S.558 contains strong provisions that will prohibit such discrimination.

Other weaknesses, however, we all were well aware of from the outset. By far the most serious of these is the lack of adequate enforcement mechanisms. Title VIII presently provides for three means of enforcement: "Pattern or Practice" suits by the Department of Justice (42 U.S.C. 3613); court action by private parties (42 U.S.C. 3612); and administrative complaints to HUD (42 U.S.C. 3610).

Of these, the first -- suits by the Department of Justice -- is necessarily of limited utility. The second -- private litigation -- has been surprisingly successful. Indeed, it has been the principal source of such progress that has been made in eliminating unlawful housing discrimination. But this enforcement mechanism carries certain inherent limitations that render it inadequate as the main mechanism for fair housing enforcement, which it

has been. The third -- administrative complaints to HUD -- is, in law and reality, not an enforcement mechanism at all in that Congress, in enacting Title VIII, provided HUD with no power other than to use "informal methods of conference, conciliation, and persuasion."

Let us examine each of these enforcement mechanisms.

First, suits by the Department of Justice are limited to those involving a "pattern or practice" or "an issue of general public importance." They are not intended to provide redress for most individual complainants. Further, the responsibility for carrying out the Attorney General's role under Title VIII is assigned to a handful of attorneys constituting one section (Housing and Civil Enforcement) of one division (Civil Rights) of the Department of Justice. Moreover, this section has litigation responsibilities in several disparate areas, of which fair housing is only one. The severe limits on the Justice Department's capacity to enforce Title VIII is demonstrated by the fact that during the three and a quarter year period from November 1, 1983 through January 31, 1987, the Department filed a total of only 53 lawsuits, fewer than 18 per year. As the United States Supreme Court pointed out some 15 years ago: "[T]he enormity of the task of assuring fair housing makes the role of the Attorney General in the matter minimal." Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972).

Nonetheless, the Justice Department's role in bringing "pattern or practice" suits remains an important one and should, by all means, be continued and strengthened. We are

gratified that S.558, among other improvements, would authorize Justice to secure monetary relief for victims of discrimination and other "aggrieved persons," as well as injunctive relief.

Second, private litigation has enjoyed substantial and growing success as an enforcement mechanism. Over recent years, the number of private fair housing suits has been increasing significantly and the percentage of private fair housing cases in which plaintiffs have prevailed is increasingly high. Further, the courts have been awarding notably high damages to prevailing plaintiffs, sometimes amounting to hundreds of thousands of dollars.

The major reason for this success is readily identifiable. It is attributable to the hard work and expertness of private fair housing groups, some 75 of which are affiliates of NCDH. These groups do the necessary investigations -- largely through testing -- to gather the essential evidence and provide assistance -- psychological as well as tangible -- to housing discrimination victims to help them through the often difficult, time consuming, and intimidating process of litigation. In addition, since the 1982 Supreme Court decision in Havens Realty Corp. v. Coleman, 451 U.S. 905 (1982), many have exercised their own standing right to institute court actions. They also have succeeded in securing the active participation of a growing number of attorneys willing and able to pursue fair housing cases on a pro bono basis. Many of these groups work under severely constrained budgets, with little in the way of staff or other resources. Yet they have carried most of the burden of enforcing Title VIII.

This enforcement mechanism had demonstrated its value and should also be retained and strengthened. S.558 does just that and removes the arbitrary and unjustifiable $1,000 limit on punitive damages.

Important as private litigation is as an effective fair housing enforcement mechanism, there are inherent limitations that restrict its efficacy as the instrument upon which we can place principal reliance for achieving nationwide fair housing reform.

For one thing, at present, private fair housing litigation is heavily dependent upon the active presence in the area of a private fair housing group. But the 75 NCDH-affiliated private fair housing centers, which represent the overwhelming majority of private groups actively engaged in fair housing enforcement, are concentrated in only three parts of the country: the Northeast, the Midwest, and California. Throughout the deep South, there are only two such fair housing centers, one in Richmond, Virginia, and the other in Atlanta, Georgia. The entire geographical area west of the Mississippi River represents a virtual fair housing desert. Except for California, there is only one private fair housing center -- in Oklahoma City -- throughout that vast segment of the country.

But as we well know -- from NCDH's 1977 massive, nationwide investigation, The Housing Market Practices Survey, and subsequent regional and local investigations -- housing discrimination is a nationwide problem. It is by no

means confined to any particular area or region, nor is any part of the country immune from it. But in large portions of the country -- those in which there is no significant private fair housing presence -- private litigation is largely precluded as an instrument of fair housing enforcement. To the extent housing discrimination victims in these areas seeks judicial redress, they must find lawyers willing and able to represent them, pay them, absorb the various costs of court action, and do whatever fact finding work that is necessary.

Second, the number of private court actions, while impressive in light of the comparatively small number of the fair housing centers and the severe limits of their resources, is miniscule in relation to the scope and severity of the problem. I would estimate that over the past five years -- a period of intense private fair housing litigation efforts -- the total number of such lawsuits can be measured at best in the hundreds. By contrast, HUD has estimated that two million instances of unlawful housing discrimination occur each year.

Third, court actions, even those involving relatively simple, "garden variety" cases, tend to be time-consuming. The due process and other precious procedural safeguards the courts have developed over centuries of jurisprudence often entail necessary delays. The overcrowded dockets burdening the courts adds measurably to the delay. But the essential need of housing discrimination victims is for a place to live and that need is usually immediate. Undue delay acts as a disincentive and discourages many from seeking court redress.

Fourth, the prospect of going to court is often an intimidating one for housing discrimination victims, few of whom are lawyers familiar with the formal trappings and arcane rules and customs of judicial proceedings. They look forward, with trepidation, to being subjected to sworn depositions or being cross-examined in open court by an unfriendly opposing counsel. This tends to discourage all but those most courageous and steadfast in their determination to secure their rights in the courts.

The third enforcement mechanism - administrative complaints to HUD -- suffers from the obvious and often fatal weakness that HUD has no authority to provide any relief to the complaining party, no matter how flagrant the violation nor how serious the injury to the complainant. Thus, although Congress assigned responsibility for "Enforcement" to HUD, it limited HUD's authority to that of conciliation. If conciliation fails -- as it frequently does -- HUD is powerless to do anything more. Its "Enforcement" authority is illusory and meaningless.

HUD's powerlessness under the present administrative complaint process is fully recognized and is reflected in statistics on the frequency with which the complaint process is used. Despite recent strenuous efforts to generate more complaints, HUD still receives fewer than 5,000 complaints annually. When compared to HUD's own estimate of two million instances of unlawful housing discrimination annually, that number amounts to less than one quarter of one percent. Moreover, HUD can only claim that some 300 result in successful conciliations. Plainly, the

administrative complaint procedure represents the weakest part of the enforcement scheme established under Title VIII. Plainly also, it is this enforcement mechanism that most needs strengthening and on which Congress should focus its attention. This is precisely what S.558 does and, in NCDH's view, does it well.

S.558 would transform the administrative complaint procedure from a largely ineffectual exercise in futility for victims of housing discrimination into an effective and inexpensive mechanism for assuring speedy, expeditious, and certain redress. It also would transform the administrative complaint procedure from a means of fair housing enforcement that justifiable lacks credibility and is little used into the major instrument for achieving the goal of equal housing opportunity in fact as well as in legal theory.

The importance of the provisions strengthening the administrative complaint procedure cannot be overemphasized. It transcends the assurance of adequate redress to the many individual victims of housing discrimination, essential as that is. It would establish the key mechanism by which national policy can be secured.

The Preamble to the Fair Housing Law states unequivocably: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. 3601.

As the United States Supreme Court has emphasized, this is a national policy to which Congress has accorded "the highest priority." The principal interest served by this

policy -- and the statue designed to further it -- is the public interest. Indeed, two of the three enforcement mechanisms provided under Title VIII place heavy responsibility on Federal Government, through the Justice Department and HUD. The "minimal" enforcement role played by Justice is a result of limitations that are inherent in the Department's traditional litigation function, which are difficult to correct through statutory amendments.

The inadequacy of the HUD administrative complaint procedure, however, does not reflect an inherent defect in the procedure, but rather, a failure to provide HUD with the necessary enforcement authority to permit the procedure to function properly. Thus the explanation for the relatively small number of complaints received annually by HUD lies in the lack of any assured redress for potential complainants. Patricia Roberts Harris, then HUD Secretary, stressed to this Committee at its 1979 Fair Housing Amendments hearings, "people don't usually undertake useless acts." Secretary Harris went on to state, "there is not much point in bringing a complaint because one may have lots of meetings and lots of discussions, but there will be no remedy and certainly no quick remedy, the average complainant is not likely to come into the process." Even when housing discrimination victims do complain, the low number of successful conciliations reaffirms the realistic perception that use of the present administrative complaint procedure will be a futile act.

S.558 would provide needed vitality to the administrative complaint procedure by adding the missing

element of enforcement. The bill would provide for an administrative procedure similar to that utilized by other enforcement agencies. It would include investigations of complaints, determinations by HUD of "reasonable cause," hearing and orders by independent administrative law judges, which are unreviewable by HUD, and appropriate judicial review by Article III United States Courts of Appeals. The relief may include a cease and desist order, compensatory damages, and, in appropriate cases, punitive damages.

This would constitute a dramatic improvement over the toothless conciliation process to which HUD is now limited. By affording a realistic opportunity for redress to housing discrimination victims, it would provide a strong incentive for them to file complaints. By providing the realistic promise of speedy and expeditious enforcement, it would provide a strong incentive for complainants and respondents to conciliate well before the hearing process even begins. We estimate that the new administrative enforcement procedure under S.558 will result in a many-fold increase in the number of complaints and, equally important, an even greater increase in the number of successful conciliations.

Individual housing discrimination victims will receive tangible benefits under this new procedure. But those benefits are incidental to the main benefit, which is to the nation and to the public interest. By generating many more complaints and encouraging many more successful conciliations, S.558 will transform the administrative complaint procedure into a strong and credible instrument for equal housing opportunity and bring the national policy

-- "to provide... for fair housing throughout the United States" -- closer to achievement.

Let us be clear on certain issues that have been raised concerning the propriety and constitutionality of the administrative enforcement procedure under S.558.

First, the issue of propriety. It has been claimed that the enforcement procedure is unfair in the HUD would serve as investigator, prosecutor, jury, and judge. Even a cursory reading of the bill demonstrates that this claim is patently untrue. Upon receipt of a complaint, HUD conducts an investigation. HUD then issues a charge, but only if two conditions are satisfied:

(1) Conciliation has failed and additional conciliation efforts are unlikely to be successful.

(2) There has been a determination that "reasonable cause exists to believe the a discriminatory housing practice has occurred or is about to occur."

Only then would HUD issue a charge leading to an administrative hearing. HUD, as the charging party, prosecutes the case, representing the interest of the United States. Thus HUD is in the traditional government role of investigator and prosecutor.

But the roles of jury and judge are played by different officials who are totally independent of HUD. The hearing

is conducted by an expert administrative law judge (ALJ) who is totally independent. The ALJ makes findings of fact and conclusions of law, and issues an order. None of these is reviewable by HUD, nor may HUD is any way affect or influence these factual or legal determinations or the order. Rather, these are reviewable by an Article III United States Court of Appeals. The Court may overturn the legal conclusions if it disagrees; may set aside the factual findings if they are unsupported by "substantial evidence on the record taken as a whole"; and affirm, modify, or set aside the order, or remand for further proceedings.

Thus the claim that HUD will serve as investigator, prosecutor, jury, and judge is plainly without foundation. The principles of fairness are strictly adhered to and due process safeguards are scrupulously provided.

Second, the issue of constitutionality. It has been claimed that the administrative enforcement procedure, insofar as it permits the award of monetary relief without a jury trial, may violate the Seventh Amendment to the United States Constitution. Some eight years ago, NCDH prepared an exhaustive memorandum on this issue, which we provided to this Subcommittee. In preparation for this hearing on a new bill, we asked a distinguished law professor, Arthur Wolf, of the Western New England School of Law, to take a fresh look at the issue and provide us with a legal memorandum.

NCDH's conclusion then, and Professor Wolf's conclusion now, is that, under applicable Federal court decisions, especially those of the Supreme Court, statutory provisions

authorizing an award of monetary relief, including damages, does not violate the Seventh Amendment. With the Committee's permission, I would like to submit both memoranda for the record. I would also like to summarize briefly the reasons for this conclusion.

The memoranda are based on a careful reading of the relevant cases, including the leading cases of Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1977); Curtis v. Loether, 415 U.S. 189 (1974); and N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

An examination of these cases reveals the following clear principles:

1. When enforcement of statutory rights through money damages, in an action involving two private parties, is assigned to Federal district courts, a jury trial generally must be available unless there is a functional justification for denying it.

2. When the United States is a party in a proceeding to enforce statutory rights principally involving the public interest, Congress may constitutionally assign the matter for initial adjudication to an administrative agency (here an ALJ), where a jury trial would be inappropriate and incompatible. Congress may authorize the ALJ to order full relief, including money damages.

3. Congress is entitled to flexibility in selecting the forum, including an administrative forum, in which such proceedings will be initially held, so as not to choke the already crowded Federal courts.

4. Congress must provide for appropriate judicial review by an Article III court (here the United States Court of Appeals).

5. We have found no court decision where the administrative award of monetary relief has been struck down as a violation of the Seventh Amendment or of any other constitutional provision.

6. Numerous Federal agencies already are authorized by Congress to award monetary relief. Few of theses statutory authorizations have been challenged and in those cases involving such challenges, the courts have uniformly upheld their Constitutionality.

guidance possible in this regard.

In conclusion, Mr. Chairman, I think that, as a general matter, the revised enforcement procedures for the Fair Housing Act of 1968 proposed by S. 558 deserve to be enacted into law. I do have several suggestions, however, that I believe would help clarify or improve these and other provisions of the bill. They are largely of a technical nature that I would be willing to discuss with Subcommittee staff as soon as possible.

I would be pleased to answer at this time any questions from the Subcommittee about the general thrust of my testimony.

egregious the injury to the complainant. Thus, although Congress assigned responsibility for "Enforcement" to HUD, 42 U.S.C. 3610, the only authority HUD has is the authority to meet with the parties, discuss the problem, and seek to conciliate a solution. This enforcement mechanism inevitably has been unsuccessful. Indeed, as Secretary Harris acknowledged at the February 1978 Hearings of the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights, there have been relatively few housing discrimination complaints under the administrative procedure authorized under 42 U.S.C. 3610. Asked for an explanation, the Secretary responded:

"I would venture a curbstone judgment that people don't usually undertake useless acts, and if it is apparent that there is not much point in bringing a complaint because one may have lots of meetings and lots of discussions, but there will be no remedy and certainly no quick remedy, the average complainant is not likely to come into the process. That is why I feel very strongly that we need enforcement potential."

Hearings, at 27.

The draft bill seeks to meet the problem of inadequate administrative enforcement directly and, by and large, does so successfully. The bill would provide for an administrative procedure similar to that utilized by other enforcement agencies, including full-scale investigations, findings of "reasonable cause," opportunity for hearings, and appropriate judicial review of a "final order."[3] Significantly, the draft bill would authorize issuance of an administrative order "providing such relief as may be appropriate, and [imposition] of a civil penalty not to exceed $10,000." This provision would constitute a vast improvement over the toothless conciliation process to which HUD is now limited under existing Title VIII. It contemplates issuance of "cease and desist" orders, which can bring a halt to the continuation of discriminatory practices by individual respondents. It also contemplates orders that can provide access to the housing, if still available, by successful complainants. Further, it affords a strong deterrent to future discrimination by providing for civil penalties in amounts up to $10,000.

Although this new authority unquestionably would improve and strengthen HUD's role in enforcing Title VIII, it falls short of providing reasonable assurance to complainants that, if successful, they will secure full relief.

Issuance of a cease and desist order, while it may eliminate future discrimination by the individual respondent, is of little practical value to complainants who are seeking relief from discriminatory acts already committed against them. By the same token, while the assessment of substantial civil penalties against individual respondents may deter future discrimination, it does not remedy the injury which the complainant has already sustained. And while an order that secures the housing for successful complainants may well remedy most of the injury they have suffered, as a practical matter, this relief frequently will not be available since by the time the lengthy administrative process has been completed, the housing will have been sold or rented.

What is missing from the draft bill is authority for HUD to order monetary relief for the complainant, such as expenses and other out-of-pocket loss resulting from the respondent's discriminatory conduct.[4] In many cases, this will be the only relief that, as a practical matter, is available to the complainants. Even in those cases where, after the administrative process is concluded, the housing unit can be secured, failure to award monetary relief means that the successful complainant cannot be made entirely whole.

The importance of this remedial gap is, most obviously, that individual complainants who avail themselves of the administrative enforcement process will rarely be able to obtain all the relief to which they are legitimately entitled. In

---

[3] The draft bill differs in several respects from H.R. 3504, concerning which the Subcommittee on Civil and Constitutional Rights held extensive hearings in 1978. One significant procedural difference is that, under section 810 of H.R. 3504, aggrieved persons would have been permitted to commence civil actions after the conclusion of the HUD administrative process. The Office of Legal Counsel of the Department of Justice, in commenting on the constitutionality of section 810 of H.R. 3504, expressed special concern over this.

> [T]he bill as presently drafted seems to invite money-minded plaintiffs to bring charges in the administrative forum, then to return to the district court if their initial efforts prove unsuccessful.

Hearings at 19, n. 5.

That concern has now been eliminated. Under the new draft bill, once the administrative hearing commences, complainants would be precluded from instituting litigation.

[4] The term "appropriate," as used in the draft bill apparently is not presently intended to include monetary relief for the complainant.

many cases, they are unlikely to secure relief that is of any practical and personal benefit to them.

The remedial gap is of great public importance in that it threatens to undermine the integrity and utility of the administrative process as an enforcement mechanism. It will be recalled that Secretary Harris explained the relatively small number of housing discrimination complaints filed with HUD under existing Title VIII by reference to the lack of HUD authority to provide an adequate remedy. The draft bill, in providing HUD with enforcement and other remedial authority, clearly relies on an increased flow of individual complaints as the source generating a vigorous administrative enforcement program. But unless victims of housing discrimination can be assured of the prospect of securing full, make-whole relief, they will become increasingly reluctant to avail themselves of the administrative process and the flow of individual complaints, upon which the success of administrative enforcement so heavily depends, will inevitably dwindle into a relative trickle. Thus, authority for HUD to order make-whole relief is essential to the success of the administrative enforcement process. Without it, complainants are likely to view use of this process as, in Secretary Harris' phrase, "useless acts" and, accordingly, avoid or abandon it.

Authority to provide such monetary relief through administrative enforcement raises a question of compliance with the requirements of the Seventh Amendment to the United States Constitution. The Office of Legal Counsel and the Congressional Reference Service, in considering this issue in relation to the administrative procedure under H.R. 3504, both acknowledged that there was no clear-cut answer. The Office of Legal Counsel suggested that, in light of the apparent constitutional problem, other remedial approaches, such as civil penalties, should be explored.[1] NCDH is in accord with the view that no definitive answer to the Seventh Amendment problem can be given. Our examination of the relevant case law, however, strongly suggests that there is full judicial support for the proposition that there is no constitutional impediment to Congress' delegation to HUD of the authority both to adjudicate disputes arising under Title VIII, and to award make-whole relief to complainants, including monetary relief. A number of federal court decisions, including those of the Supreme Court, while not specifically concerned with the precise issue involved here, have stressed the broad discretion of Congress to delegate to administrative agencies full authority to adjudicate matters of public interest within their special competence and to provide full, make-whole relief to complainants. Indeed, we are aware of no federal court decision that has ruled to the contrary. Further, the experience of other administrative agencies—federal and state—to which the respective legislatures have delegated such authority, also strongly suggests that Congress may provide for such full enforcement of public statutory rights through the use of administrative procedures, without in any way contravening the requirements of the Seventh Amendment. In the process, HUD will vindicate the larger public interests embodied in the Act, while at the same time providing significant deterrents to future violations.

Discussion

I. CONGRESS MAY ASSIGN AUTHORITY TO ENFORCE STATUTORY RIGHTS PRINCIPALLY INVOLVING PUBLIC, AS OPPOSED TO PURELY PRIVATE, INTERESTS TO EXPERT ADMINISTRATIVE AGENCIES, INCLUDING AUTHORITY TO ORDER MONETARY MAKE-WHOLE RELIEF FOR COMPLAINANTS.

The Seventh Amendment provides that "in Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const. amend VII. In no case have the federal courts held that this provision is a bar to vesting enforcement powers in an administrative agency, including the authority to award monetary, make-whole relief to victims of practices made unlawful by valid acts of Congress. Indeed, the federal courts uniformly have upheld the constitutionality of administrative proceedings designed to effectuate the Congressional intent in enacting "public" statutes. By their nature, these administrative enforcement proceedings serve a variety of functions, only one of which is the provision of individual monetary relief. Proceedings of the type contemplated by the proposed Title VIII amendments are intended to vindicate the greater public interest of eliminating housing discrimination, while

[1] The Office of Legal Counsel also acknowledged its lack of expertise and sensitivity to the policy and administrative considerations that are inevitably involved. Hearings at 18.

safeguarding the due process rights of alleged violators and providing adequate deterrence to future violations. Similar proceedings have been upheld, both where the monetary relief runs primarily to the individual who has been injured by the complained-of practice, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), and where the relief ordered takes the form of a civil penalty to be paid to the United States Government. *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission et al.*, 97 S.Ct. 1261 (1977).

Atlas Roofing is the most recent Supreme Court decision dealing with the enforcement powers of administrative agencies and is thereby deserving of careful analysis. There, the Court upheld an administrative scheme for enforcement of the provisions of OSHA which provided for the assessment of a civil penalty against a violator, "without the employer ever being entitled to a jury determination of the facts constituting the violation." 97 S.Ct. at 1265. The Court noted that Congress, after conducting extensive investigations into the problems of workers' health and safety, had concluded that a "drastic 'national' problem" existed, and that existing statutory and common law remedies were inadequate to resolve the crisis. On that basis, the Court held that the Seventh Amendment does no operate as a bar to Congressional action entrusting enforcement of statutory rights to administrative agencies.

The Court said:

"At least in cases in which 'public rights' are being litigated—e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the fact-finding function and initial adjudication to an administrative forum with which the jury would be incompatible."

97 S.Ct. at 1266

Thus, as the *Atlas Roofing* Court made clear, Congress is vested with a great deal of discretion in determining the forum to which protection of public rights will be assigned. The Court emphasized "[T]he right to a jury trial turns not solely on the nature of the issue to be resolved, but also on the forum in which it is to be resolved." *Id.* at 1272. Accordingly, where the right involved is a public right, and where an administrative agency is an appropriate forum for adjudication of that right, the Seventh Amendment guarantees do not come into play. The specific nature of the remedy involved in a particular proceeding is by no means the sole consideraion. In *Atlas Roofing*, the Court specifically upheld Congress' authority to empower administrative agencies to order monetary relief—there in the form of civil penalties—without contravening the Seventh Amendment. The fact that the remedy was imposition of civil penalties was virtually ignored by the Supreme Court and played no apparent part in its decision.

The Court in *Atlas Roofing* did not, in any real sense, break new ground or enunciate new legal principles regarding the Seventh Amendment that differed sharply from those followed in previous cases. Thus a substantial number of labor law cases, starting with *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, supra, had already been decided in accordance with the principles affirmed in *Atlas Roofing*. In *Jones & Laughlin*, the Court upheld the constitutionality of the National Labor Relations Act's provisions which empowered the Board to conduct administrative hearings based on charges of unfair labor practices and to order appropriate monetary relief to complaining parties, as well as reinstatement. As in *Atlas Roofing*, the *Jones & Laughlin* Court stressed the significant "public" interest concerns which motivated Congress in enacting the legislation. The Court noted that "the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace." 301 U.S. at 42. The fact that individual monetary relief was awarded in unfair labor practice proceedings was deemed incidental to the Board's larger role of enforcing public policy as enunciated by the Act. Against claims of constitutional infirmity, the Court found no constitutional impediment to the scheme enacted by Congress.

Of special importance is that the Court found the Board's order awarding monetary relief in the form of backpay to complaining parties to be a proper exercise of constitutionally permissible authority. To the claim that the Seventh Amendment barred such awards without a trial by jury, the Court stated that the Amendment has "no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law." 301 U.S. at 48. The Court added:

"Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement." *Id.*

Cases subsequent to *Jones & Laughlin* have also made it clear that the NLRB's authority to award backpay is not limited to situations in which hiring or reinstatement are ordered. Thus, the Supreme Court has affirmed Board orders of backpay alone. *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177 (1941), and *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17 (1954). In each case, the Court stressed that the remedy of backpay is designed to *make the employee whole for the losses suffered* as a result of the unfair labor practice. Indeed, the Court in *Phelps Dodge* stated.

"Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces." 313 U.S. 197.

The office of Legal Counsel memorandum notes that *Jones & Laughlin* may not be dispositive of the constitutional issue of providing monetary relief under Title VIII because in that case the monetary relief consisted of backpay, which "was basically equitable in nature . . ." Hearings at 17. To be sure, the monetary relief that HUD would be authorized to provide under Title VIII could not be characterized as backpay. Rather, HUD would be authorized to order make-whole relief, in the form of out-of-pocket loss to the complainant resulting from a respondent's unlawful discrimination. The distinction, however, is hardly one of constitutional dimension; rather, it reflects the differences between the nature of the injuries resulting from housing discrimination and those resulting from unfair labor practices. To characterize monetary relief for loss of backpay as "equitable" and similar relief for out-of-pocket loss as "legal" has little or no relevance to the question of whether a jury trial is required in order that a victim of housing discrimination be accorded full relief for the injury suffered as a result of the unlawful act.

Indeed, the Supreme Court, in *Atlas Roofing*, specifically rejected the contention that its earlier decision in *Jones & Laughlin* had turned on whether the administrative proceeding was equitable in nature. 97 S. Ct. at 1269. In so doing, the Court pointed to its earlier decision in *Block* v. *Hirsh*, 256 U.S. 135 (1921), in which it had upheld the constitutionality of the establishment of an administrative tribunal with authority to determine reasonable hold-over rents. In that case, the *Atlas* Court noted, it had "squarely rejected a challenge to the statute based on the Seventh Amendment." 97 S. Ct. at 1267. Moreover, in *Curtis* v. *Loether*, 415 U.S. 189 (1974),[6] a case involving the right to trial by jury in Title VIII proceedings brought in federal district courts, the Court expressly stated that it "need not, and [did] not go so far as to say that any award of monetary relief must necessarily be 'legal' relief." [and thereby subject to the Seventh Amendment's jury trial guarantee].

A recent decision by the Supreme Court further demonstrates that its decision in *Jones and Laughlin* was not based on the mere characterization of backpay as incidental to "equitable" relief. In *Lorillard* v. *Pons*, 98 S. Ct. 866 (1978), the Court held that a trial by jury was required in civil actions brought either by the Secretary of Labor or a private complainant to enforce the provisions of the Age Discrimination in Employment Act.[7] In support of its holding, the Court looked to Congressional intent in enacting the ADEA, as well as to its enforcement sections, which provide that in actions brought either by the Secretary or by a private complainant, courts are empowered to award appropriate "*legal* or equitable relief." 98 S. Ct. 871. (emphasis in original). The Court concluded that since "the word 'legal' is a term of art" which calls into play the protections of the Seventh Amendment, "Congress knew the significance of the term . . . and intended that there would be jury trial on demand." *Id.* The Court pointed out that Congress had not specified which relief was equitable and which was legal; however, it was clear to the Court that Congress intended "'legal relief' to refer to judgments 'enforcing . . . liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation'." *Id.* n. 11

Manifestly, there is no discernible distinction, in law or in logic, between unpaid minimum wages or unpaid overtime awards, as in *Lorillard*, and backpay

---

[6] For further discussion of *Curtis* v. *Loether*, see infra at 17.

[7] The ADEA provides only for enforcement through a civil action in Federal district court, filed either by the Secretary of Labor or by private complainants 29 U.S.C. 621, 626(b) & (c).

awards, as in *Jones & Laughlin*. Nor was this the basis for Court's decision in *Lorillard* that a jury trial was required. Rather, the decision was based on the fact that Congress had assigned enforcement of the ADEA to the federal courts and that Congress, by use of the term o art, "legal," had expressed its intent that the Seventh Amendment's jury trial requirement was to apply.

Moreover, the argument that there exists a distinction beween "backpay" and other "make-whole" relie, which somehow justifies the award of the former by an administrative agency, but not the latter, is further contradicted by consistent judicial affirmance of NLRB orders which extend beyond the traditional beakpay remedy. Courts have not deemed the Board to be restricted in the exercise of its remedial authority by the express authorization to award backpay. Rather, they have looked to the language of the statute which orders the Board to take "affirmative action" to effectuate the purposes of the Act and granted the Board wide discretion in the shaping of appropriate remedies. Thus, the Second Circuit in *National Labor Relations Board* v. *Cadillac Wire Corp.*, 290 F. 2d 261 (2d Cir. 1961), upheld a Board order requiring the employer and union to reimburse employees for u ion dues wrongfully withheld from their paychecks during their first 30 days work. The Court said:

> Such a "reimburse nt" is not "punitive" . . . Reimbursement is therefore "remedial" within th language of . . . *Local. 60* v. *N.L.R.B.*, since it enables the Board to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice. By hypothesis the unlawful payment of the due was coerced, and the repayment of the whole amount merely put the employee in the same position he would have been in had the statute been obeyed.

290 F. 2d at 263.

In short, the relief, thou h not backpay, was necessary for make-whole purposes and was held to be in accordance with constitutional requirements.

Similarly, the District of Columbia Circuit, in an opinion by then Judge, now Chief Justice Burger, affirmed a Board award which included interest on backpay. In *International Brotherhood of Operative Potters, AFL–CIO* v. *National Labor Relations Board*, 320 F. 2d 757 (D.C. Cir. 1963), the court noted that the Board's "longstanding policy" had been to deny interest on backpay awards, but rejected the defendant's argument that, absent express authorization, the Board was without authority to change is policy and make such awards. Rather, the court stated:

"In the evolution of the law of remedies some things are bound to happen for the 'first time.' As a supplement to existing remedies long approved we cannot say that the allowance of interest is other than a factor which effectuates the policies of the Act for it is plainly in the direction of making the employee whole . . . We cannot regard changes in remedial mechanisms as beyond the Board's powers so long as they reasonably effectuate the congressional policies underlying the statutory scheme." 320 F. 2d at 761.

See also *National Labor Relations Board* v. *Mooney Aircraft, Inc.*, 375 F. 2d 402 (5th Cir. 1967), in which the court affirmed an award of backpay which was computed on the basis of what the unlawfully discharged employee would have been paid had he been promoted on a date certain after his discharge, rather than on the basis of his salary at the time of his unlawful termination. In addition, the court upheld that portion of the Board's order which required the defendant to continue paying the employee this differential, even after reinstatement, until such time as he was actually promoted.

The Supreme Court has also upheld orders of the Board which required employers to pay fringe benefits promised under the terms of collective bargaining agreements. In *National Labor Relations Board* v. *Strong*, 393 U.S. 357 (1969), the Supreme Court, after finding that the refusal of an employer to sign a collective bargaining agreement which had been negotiated between the union and an employers' association constituted a violation of section 8(a)(5), of the Act 29, U.S.C. 158(a)(5), held:

"Once adjudicated, [the unfair labor practice] could be remedied by a Board order requiring payment of those fringe benefits which would have been paid had the employer signed and acknowledge [sic] the contract which had been duly negotiated . . . ."393 U.S. at 362.

It is not clear just how far the Board's authority to remedy violations of the National Labor Relations Act extends. Again, however, the courts have consistently evinced an intent to give the Board wide discretion in fashioning relief. Thus, in affirming the NLRB's refusal to award compensatory damages or back-

pay to independent contractors whom the Board had ordered reinstated, the Court of Appeals for the Ninth Circuit relied, not on any Seventh Amendment considerations, but on the board discretionary authority of the NLRB. The Court said:

"When, and to what extent, damages may serve the policy of the National Labor Relations Act in a given case, is a complex problem for the Board to decide in light of its administrative experience and knowledge. The Board draws on a unique fund of expertise, and its choice of remedy must be given special respect by the reviewing courts."

Newspaper & Periodical Drivers & Helpers Union, Local No. 921 v. National Labor Relations Board, 509 F. 2d at 99, 100, *cert. denied* 423 U.S. 831 (1975).

Moreover, the District of Columbia Court of Appeals has remanded cases to the Board for failure to provide an adequate remedy under the circumstances. In *International Union of Electrical, Radio and Machine Workers, AFL–CIO, v. Tidee Products, Inc.* (*Tidee I*), 426 F. 2d 1243 (D.C. Cir.), *cert denied* 400 U.S. 950 (1970), the court found that the Company's refusal to bargain, after a valid election, was a "clear and flagrant violation of the law," which necessitated the entry of an order providing a remedy other than the "traditional" cease and desist order. 426 F. 2d at 1248.

Tidee III finally disposed of the disputes in this case. In *International Union of Electrical, Radio and Machine Workers, AFL–CIO v. National Labor Relations Board*, 502 F.2d 249 (D.C. Cir.), 417 U.S. 921 (1974), the court, after the original remand and an intermediate enforcement hearing, 440 F. 2d 298 (1970), affirmed the Board's order awarding attorneys' fees and litigation expenses to the plaintiff union. In *Ex-Cell-O-Corp. v. NLRB*, 440 F. 2d 1046, (D.C. Cir. 1971), the court specifically upheld the Board's authority to order monetary relief, in the form of "make-whole" compensation. The court said:

"The clear import of *Tidee Products—I* is that an employer's refusal to bargain based on a frivolous challenge to an election is of itself a serious and manifestly unjustified repudiation of the employer's statutory duties and denial of employees' statutory rights to collective bargaining, and that *'make-whole' compensation is a proper remedy . . . .*" (italic added)[8] 449 F. 2d at 1049.

Thus, as the preceding discussion demonstrates, neither the nature of the relief which an administrative agency is empowered to award nor the characterization of that relief—equitable or legal—is decisive in determining the applicability of the Seventh Amendment trial by jury guarantees. Rather, the type of interests asserted—public vs. purely private—, the forum in which those interests are to be addressed—administrative vs. judicial—and the intent of Congress, determine the constitutionality and propriety of vesting enforcement powers in an administrative agency.

Under the proposed Title VIII amendments, the interests served by providing more effective enforcement through the administrative process are unquestionably public, not private. As the Supreme Court has emphasized, Title VIII represents a policy to which Congress has accorded "the highest priority." *Trafficante, supra* at 211. The monetary relief for complainants is only incidental to the larger public interest in eliminating housing discrimination as a fact of American life. The forum chosen by Congress would be an administrative one, "where jury trials would be incompatible with the whole concept of administrative adjudication." *Curtis v. Loether, supra* at 194. And Congress clearly intends, through the proposed amendments, that adjudication and relief be a matter for administrative determination, with appropriate judicial review. Thus, it would be entirely proper for Congress to vest full enforcement powers, including the authority to award make-whole monetary relief to victims of housing discrimination, in HUD, the expert housing agency.

Curtis v. Loether, 415 U.S. 189 (1974) is the only case in which the Supreme Court has had the opportunity to determine the application of the Seventh Amendment's jury trial requirement to Title VIII. There, the Supreme Court held

---

[8] The court granted the Union's motion for summary reversal, and remanded with explicit directions for the Board to consider the propriety of awarding "make-whole" relief under the circumstances of the case. On subsequent review, *Ex-Cell-O-Corp. v. NLRB*, 449 F.2d 1058 (D.C. Cir. 1971), the court affirmed the denial of "make-whole" compensation on the ground that the company's action had not been "frivolous." The court emphasized, again, that the original remand was because "the Board, explicitly refusing to adhere to *Tidee Products—I*, erroneously concluded that it had no statutory authority to award 'make-whole' compensation." 449 F.2d 1064, and that it (the court) "believe[d] the Board erred in its analysis of the applicable legal rules * * * *" Id., at 1065.

that, under the circumstances of that case—a civil action in federal district court, involving a private plaintiff and a private defendant, in which money damages as well as injunctive relief were sought—the jury trial requirement was applicable. *Curtis*, however, cannot reasonably be read as barring administrative awards by HUD of monetary, make-whole relief to complainants. Indeed, the Court's opinion provides support for the constitutionality of such administrative awards.

In *Curtis*, the Court was careful to limit its decision to the specific facts of the case before it, spelling out not only what it *was* deciding, but what it was *not* deciding. Further, the Court indicated that under circumstances other than those specifically presented in *Curtis*, the decision on the jury trial requirement might well be different.

First, while noting that "the relief sought here—actual and punitive damages—is the traditional form of relief offered in the courts of law," 415 U.S. at 196, the Court stressed: "We need not, and do not, go so far as to say that any award of monetary relief must necessarily be 'legal' relief," [and thereby subject to the Seventh Amendment's jury trial requirement]. Id.

Second, the Court made clear that the result of its decision was "only to direct that a certain form of procedure be employed in *federal court actions under § 812*." Id. at 192, n. 6 (italics added). Thus the Court left undecided whether the same procedure must be followed in judicial forums other than the federal courts* or when enforcement mechanisms other than the judicial ones provided under section 812 are employed.

Third, the Court said:

"[W]hen Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, *where there is obviously no functional justification for denying the jury trial right* a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law" (italic added). Id. at 195.

Thus the Court, by negative implication, strongly suggested that if there is a functional justification for denying a jury trial it need not constitutionally be provided. As the prime example of a case involving such a functional justification, the Court cited *NLRB v. Jones & Laughlin Steel Corp., supra*, where the Supreme Court had upheld the award of backpay by the NLRB without a jury trial. The *Curtis* Court emphasized:

"*Jones & Laughlin* merely stands for the proposition that the Seventh Amendment is generally inapplicable in administrative proceedings where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the NLRB's role in the statutory scheme." 415 U.S. at 194.

Thus *Curtis* does not hold, nor does it suggest, that the Seventh Amendment operates as a bar to vesting enforcement powers in an administrative agency, including authority to award monetary, make-whole relief to individual complainants. NCDH submits that the role of HUD in protecting against housing discrimination would be functionally identical to the role of the NLRB in protecting against unfair labor practices and that, just as the NLRB's authority to award backpay and other monetary relief to private complainants has been upheld, so too would similar authority accorded to HUD.

The Court's later ruling in *Atlas Roofing* underscores the limited nature of the *Curtis* holding and reaffirms, as did *Curtis*, the constitutional authority of Congress to assign enforcement of statutory rights to an administrative agency. Further, the *Atlas Roofing* Court enunciated principles of general applicability concerning the circumstances under which Congress may assign such enforcement authority to an administrative agency.

First, in upholding the authority of OSHA to order monetary relief—there, civil penalties—the Court pointed to the already heavy burden on the federal courts and expressed concern over imposing new burdens on them regarding areas in which they have no special competence. The Court said:

"Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation nor prevented from com-

---

* Indeed, the Court recognized that actions under section 812 may be instituted in State, as well as Federal court, but declined to "express [any] view as to whether jury trials must be afforded § 812 actions in the State courts." Id. at 192, n. 6.

mitting some new types of litigation to administrative agencies with special competence in the relevant field." [9] Id. at 1269.

The Court emphatically added on this point:

"This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned instead to a federal court of law instead of an administrative agency." Id.

Second, the Court quoted with approval its earlier statement in *Curtis* upholding "'congressional power to entrust enforcement of statutory rights to an administrative process . . . free from the strictures of the Seventh Amendment.'" Id. at 1268.

Third, as noted earlier, the Court rejected the contention that its decision in *Jones & Laughlin* had turned on the fact that the proceeding there had really been equitable in nature. Id. at 1269.

Fourth, the Court discussed the history of the Seventh Amendment, concluding that it was "never intended to establish the jury as the exclusive mechanism for fact-finding in civil cases." *Id.* at 1271.

The Court said:

"We cannot conclude that the Amendment rendered Congress powerless—*when it concluded that remedies available in courts of law were inadequate to cope with a problem within Congress' power to regulate*—to create new public rights and remedies by statute and commit enforcement, if it chose, to a tribunal other than a court of law—such as an administrative agency—in which facts are not found by juries." *Id.* (italic added).

In upholding the enforcement authority of OSHA, the Court stressed:

"[The] right to a jury trial turns not solely on the nature of the issue to be resolved, but also on the forum in which it is to be resolved." *Id.* at 1272.

Fifth, the Court reaffirmed, in carefully qualified terms, the circumstances under which the Seventh Amendment's jury trial requirement applies. "The Seventh Amendment prevents Congress from depriving a litigant of a jury trial in a 'legal' action before a tribunal customarily utilizing a jury as its fact-finding arm. . . ." *Id.* at 1272, n. 16. This statement echoes precisely the similarly qualified holding of *Curtis* v. *Loether*, *supra*, a holding which manifestly does not present any constitutional impediment to vesting in HUD the authority to award make-whole relief.

Finally, while *Atlas Roofing* involved the imposition of civil penalties, payable to the Government, rather than damages for out-of-pocket loss, payable to the complainant, the Court placed no importance on this distinction, nor did it play any apparent part in the decision.

II. OTHER FEDERAL AND STATE AGENCIES ARE EMPOWERED TO AWARD MAKE-WHOLE RELIEF, INCLUDING MONETARY RELIEF TO COMPLAINANTS PARTICIPATING IN THE AGENCY'S ENFORCEMENT PROCEEDINGS

The constitutionality and propriety of the administrative enforcement mechanisms which the proposed Title VIII amendments would vest in HUD finds further support in the fact that similar mechanisms are already available to other agencies. Indeed, they are patterned after administrative procedures currently employed by other federal agencies. Similarly, a number of states have empowered appropriate agencies to enforce the requirements of public legislation, including fair housing legislation. In each instance, the enforcement powers of the agencies extend well beyond issuance of cease and desist orders and the assessment of civil penalties. Congress and the states have authorized these agencies to award full and appropriate monetary relief to compensate complainants for the injuries suffered as a result of the discriminatory and/or unfair practices.

As noted earlier, the National Labor Relations Board has long been authorized to award backpay, with or without reinstatement, to employees who have been victimized by unfair labor practices. The Board's proceedings, like those contemplated for HUD, provide for the filing of a charge, a hearing with appro-

[9] The Office of Legal Counsel notes that Title VIII is not new legislation, having been enacted more than 10 years ago, and that *Curtis* v. *Loether* was decided more than four years ago. Hearings at 18. But provision for administrative enforcement can hardly be viewed as "cosmetic," nor as a subterfuge to evade the right to a jury trial. The proposed Title VIII amendments are in response to 10 years of experience demonstrating that sole reliance on the courts for enforcement is inadequate. Certainly, it cannot be argued that, once Congress assigns enforcement of a statutory right, it may never provide for any other means of enforcement.

priate notice and opportunity to be heard, and appeal to the Court of Appeals for review of the Board's decision. Moreover, the Supreme Court has upheld this authority of the Board to order monetary, make-whole relief, even in situations where there is a parallel remedy in federal district court. The Court in *N.L.R.B. v. Strong*, supra, affirmed a Board order requiring the employer to pay fringe benefits to his employees, in the face of the employer's argument that "ordering the payment . . . of benefits reserved in the contract inserts the Board into the enforcement of the collective bargaining agreement, contrary to the policy and scheme of the statute." 393 U.S. at 360.

The Interstate Commerce Commission, too, has long been authorized to award damages, i.e., reparations, to individual or other specified complainants alleging violations of Title 49 of the United States Code. Section 13 empowers the Commission to receive complaints and conduct investigations and hearings. 49 U.S.C. 13. Section 16(1) provides:

"(1) If, after hearing . . . as provided in section 13 of this title, the commission shall determine that any party complainant is entitled to an award of *damages* under the provisions of this chapter . . . the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named." 49 U.S.C. 16(1) (italic added).

Section 16(2) details the procedures available for enforcement of the Commission's order. The Court, in *Meeker v. Lehigh Valley Railroad Company*, 236 U.S. 412 (1914), upheld the constitutionality of that portion of section 16(2) which renders the findings of the Commission "prima facie evidence of the facts stated therein." 49 U.S.C. 16(2) against an argument that the right to fact-finding by a jury was deprived. There have been no reported challenges to the Commission's authority to award damages to complaining parties.

More recently, Congress has explicitly authorized an administrative commission to hear complaints of discrimination made by miners and to award appropriate relief to remedy the injuries suffered as a result of the discriminatory action. Thus, in the Federal Coal Mine and Safety Act of 1969, as amended in 1977, 30 U.S.C. 801 et seq., Congress provided that miners or applicants for employment who believe that they have been discriminated against by their employers because of their assertion of rights protected by the Act can file complaints with the Secretary. If after preliminary investigation, the Secretary determines that the antidiscrimination provisions of the Act have been violated, the Secretary must immediately file a complaint with the Federal Mine Safety and Health Review Commission, which in turn conducts a hearing, makes findings, and awards appropriate relief. The Commission is authorized to order the employer "to take such affirmative action to abate the violation as . . . appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with backpay and interest." 30 U.S.C. 815(c)(3). Review of the Commission's orders by appeal to the appropriate Court of Appeals is identical to that proposed in the Title VIII amendments.

In enacting amendments to the Act in 1977, Congress made clear that the Commission was to provide full relief to complainants, including monetary relief. Thus the Senate Committee emphasized:

"It is the Committee's intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct *including but not limited to reinstatement with full seniority rights, backpay with interest, and recompense for any special damages sustained as a result of the discrimination*. The specified relief is only illustrative." S. Rep No. 181, 95th Cong., 2nd Sess. 37 (1977). [emphasis added]

Here, as in the case of the proposed Title VIII amendments, Congress was concerned with vindicating the public interest in eliminating the "deleterious effects of the discriminatory conduct." Here, as under the Title VIII amendments, Congress designated an administrative body to adjudicate the complaints. And here, as under the Title VIII amendments, Congress expressed the intention that the agency provide full relief, including "backpay with interest, and recompense for any special damages sustained as a result of the discrimination."

In addition to federal agencies, a variety of state agencies have been empowered to administer and enforce various state laws, including specifically fair housing laws.[11] Generally, the proceedings established by state fair housing

[11] The discussion which follows regarding the procedures and powers of several State fair housing agencies is not intended to be exhaustive. We have not attempted to review the statutes of every State; rather, we have selected a few with which we have some familiarity, and which we feel are illustrative of administrative bodies possessing meaningful enforcement mechanisms.

laws provide for the filing of complaints alleging a discriminatory housing practice; investigation by the appropriate agency or commission; attempts, after a finding of probable cause, to conciliate the discriminatory practice; upon failure of conciliation, the filing of a certified complaint or notice by the agency; a hearing on the record, conducted by the agency; and a final order, which includes both a cease and desist order and individualized relief. The individualized relief most often takes the form of money "damages" for the victims of housing discrimination. In fact, such relief is frequently specifically authorized.

Thus, California's Fair Employment Practices Commission is authorized to order the sale or rental of a contested housing unit, or a like unit, or to require respondent to pay "damages," not to exceed $1,000, to the aggrieved party if the former remedy is unavailable. California Health and Safety Code, § 35700, 35738(3). Similarly, the Massachusetts Commission Against Discrimination is empowered to award "damages," not to exceed $1,000. Annotated Laws of Massachusetts, Chapter 6 § 33(5). Such damages, by statute, include expenses incurred for obtaining alternate housing, storage, moving, and any other expenses. Other state commissions authorized to award "damages" include the District of Columbia ("compensatory damages"), Human Rights Act of 1977, Sec. 301, 313; Kentucky ("damages" . . . . including "compensation for humiliation and embarrassment" and expenses incurred), KRS, Ch. 344, Sec. 230; Missouri ("an award of actual damages"), Mo. Human Rights Law, 213.120; and New York ("compensatory damages"), NY Human Rights Law, Art. 15, 297(4)(c). In addition, Minnesota law authorizes the award of "compensatory damages, except damages for mental anguish or suffering," as well as "punitive damages in an amount not less than $25 nor more than $500," Minnesota State Act Against Discrimination, 363.071, subd. 2. And the Michigan Commission on Civil Rights is empowered to issue a final order requiring the respondent to pay the complainant "damages" for an injury or loss caused by "violation of the Act, including attorneys' fees." Michigan Civil Rights Act, Act No. 453, Public Acts of 1976, Sec. 602.

Even where damage awards are not specifically authorized by statute, they have nonetheless been upheld. Thus, the New Jersey Supreme Court upheld an award of damages to a victim of housing discrimination, pursuant to a statutory scheme which authorized the Director of the Division of Civil Rights to conduct hearings, make findings, and order such "affirmative action . . . as, in the judgment of the director, . . . will effectuate the purpose of the act." *Jackson* v. *Concord Company*, 54 N.J. 113, 253 A.2d 793, 799 (1969). The *Jackson* court spoke emphatically of the public interest in protecting the rights guaranteed by the administrative scheme:

"From all of this it is patently clear that the Legislature intended to create an effective enforcement agency in order to eradicate the cancer of discrimination. Even in the case of an individual complainant, it is plain that the public is involved. Discrimination, by its very nature, is directed against an entire class in the particular circumstances and wrongful conduct against a complaining individual is indicative of such a state of mind in the wrongdoer against the class." 253 A. 2d 799.

The Court found no constitutional objection to "legislative authorization to an administrative agency to award, as incidental relief in connection with a subject delegable to it, money damages." Id. at 800. Rather, the only question was whether the Legislature had intended to give such authority to the Director, a question which the Court answered in the affirmative. The Court reasoned that since backpay had been specifically authorized in employment discrimination cases, make-whole monetary damages were the obvious analogous remedy in housing discrimination cases. Significantly, the Court emphasized the exclusivity of the administrative remedy, noting that the "final determination . . . shall exclude any other action." Id. at 801. In the Court's mind, the foreclosure of other remedial actions necessitated the conclusion that the Director was authorized to award monetary damages for losses incurred.

Thus the administrative enforcement procedure provided under the proposed Title VIII amendments is not unique. Virtually identical procedures have been authorized and utilized by a variety of federal and state agencies, including a number of fair housing agencies. In many cases, the remedial powers assigned to these agencies have included the power to order make-whole, monetary relief. These have presented no insuperable Seventh Amendment problems to the respective legislatures that have enacted them, nor to the courts on those occasions when they have been called upon to determine their validity and propriety.

Conclusion

The necessity for amending Title VIII to provide for administrative enforcement has been established by more than 10 years of experience demonstrating the ineffectiveness of reliance on the combination of litigation and HUD conciliation. The proposed amendments to Title VIII would provide HUD with extensive enforcement authority but not the authority to award monetary relief, in the form of out-of-pocket loss, to complainants. The unavailability of complete relief serves as a disincentive to complainants who would otherwise pursue administrative remedies. Since effective administrative enforcement would depend so heavily on the willingness of aggrieved persons to complain to HUD and pursue the administrative process, the lack of HUD authority to order full relief to complainants, including monetary relief, threatens to undermine the integrity and viability of the administrative enforcement procedure that is necessary to achieve the national policy of providing "for fair housing throughout the United States."

The issue addressed in this memorandum is whether monetary relief, in the form of an administrative order by HUD providing for recovery of expenses and other out-of-pocket loss to a complainant resulting from acts of unlawful housing discrimination by a respondent, would be consistent with the jury trial requirement of the Seventh Amendment. There is little authoritative case law generally on this subject, and none dealing with the precise issue. Consequently, it is impossible to provide a definitive answer. Nonetheless, key decisions by the Supreme Court of the United States, setting forth the basic principles under which the constitutionality of administrative enforcement of statutory rights is to be determined, strongly suggest that inclusion of monetary relief in the administrative enforcement of housing discrimination complaints would not contravene Seventh Amendment requirements. These key Supreme Court decisions—*Jones & Laughlin*, *Curtis* v. *Loether*, and *Atlas Roofing*—establish the following relevant principles:

1. When enforcement of statutory rights, through money damages, is assigned by Congress to federal district courts, a jury trial generally must be available unless there is a functional justification for denying it.

2. Congress generally may assign enforcement of statutory rights principally involving the public, as opposed to private, interest to administrative agencies possessing special expertise, without violating the constitutional right to a jury trial.

3. Administrative agencies to which Congress has assigned responsibility for enforcing statutory right may, consistent with the intent of Congress, order full relief—monetary as well as injunctive—where necessary to make the complainant whole.

Under these basic principles there would appear to be no constitutional impediment to Congress' authorizing HUD to provide successful complainants with make-whole relief, including, in appropriate cases, recovery of expenses and other out-of-pocket loss resulting from the respondent's unlawful discriminatory acts.

First, the proposed Title VIII amendments would specifically assign enforcement authority to HUD, to be carried out through administrative proceedings, "where jury trials would be incompatible with the whole concept of administrative adjudication. . . ." *Curtis* v. *Loether*, *supra* at 194. Thus the context in which the jury trial issue would be determined would be an administrative proceeding, not "an ordinary civil action [for damages] in the [federal] district courts. . . ." Id. at 195. As the Supreme Court emphasized in *Atlas Roofing*, Congress may, without violating the Seventh Amendment, assign enforcement of statutory rights "to administrative agencies with special competence in the relevant field." *Atlas Roofing*, *supra* at 1269. As the Court also emphasized, Congress is constitutionally authorized to do so, "even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned instead to a federal court of law instead of an administrative agency." Id. Thus the forum—administrative vs. judicial—in which enforcement of statutory rights is to be adjudicated is an important element in determining whether there is a right to a jury trial.[42] As the Supreme Court has stressed:

---

[42] The Supreme Court also intimated that even when statutory enforcement is assigned to the Federal courts, the right to a jury trial may not be absolute. That right exists only "where there is no functional justification for denying the jury trial right." *Curtis* v. *Loether*, supra at 195.

"[T]he right to a jury trial turns not solely on the nature of the issue to be resolved, but also on the forum in which it is to be resolved." *Atlas Roofing*, *supra* at 1271–1272

Second, the statutory right—fair housing—involves not merely private disputes between complainants and respondents, but matters of national policy. As Congress, expressed it, in the very first section of Title VIII:

"It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. 3601.

The Supreme Court has noted, that this policy is one to which Congress has accorded "the highest priority." *Trafficante*, supra at 211.

It is because this national policy has not been achieved through existing enforcement mechanisms that Congress would now provide for administrative enforcement procedures as well. The fact that private complaints would secure make-whole relief, including out-of-pocket loss, would be only incidental to the greater public purpose of providing "for fair housing throughout the United States." Indeed, unless private complainants have reasonable assurance that the administrative process can make them whole, they may abandon it, frustrating Congress' intent that, Title VIII enforcement be made more effective.

Third, the fact that HUD would be authorized, in appropriate cases, to award monetary relief to complainants, does not contravene the requirements of the Seventh Amendment, so long as such authority is consistent with the intent of Congress and calculated to make complainants whole.

In this connection, NCDH can see no basis for a constitutional distinction between administrative awards of monetary relief in the form of backpay, as in *Jones & Laughlin* and other NLRB cases, and administrative awards of monetary relief in the form of out-of-pocket loss, as provided under the proposed Title VIII amendments. Characterization of the former kind of monetary relief as "equitable" and the latter as "legal" provides little help in analyzing the considerations underlying the jury trial requirement. Awards of backpay in employment cases and out-of-pocket loss in housing cases both constitute monetary, make-whole relief and cannot realistically be distinguished by reference to legal jargon. Indeed, in *Atlas Roofing*, supra at 1269, the Supreme Court specifically rejected the contention that *Jones & Laughlin* had turned on the "equitable" nature of the proceeding. Moreover, the Supreme Court and federal courts of appeals have consistently approved administrative awards of monetary relief in employment cases that extended well beyond backpay alone. See, e.g., *NLRB* v. *Strong*, supra (fringe benefits); *International Brotherhood of Operative Potters, AFL-CIO* v. *NLRB*, supra (interest on backpay); *International Union of Electrical Radio and Machine Workers, AFL-CIO* v. *NLRB (Tiidee III)*, supra (attorneys' fees and litigation expenses).

In *Atlas Roofing*, the Supreme Court upheld the constitutionality of an administrative order imposing a civil penalty. The Court's decision, however, did not turn on the specific nature of the monetary relief. Indeed, the Court barely acknowledged the fact that civil penalties were involved and it was totally ignored in the Court's analysis. Thus there is no legal basis for distinguishing on constitutional grounds, between monetary relief in the form of civil penalties and similar relief in the form of out-of-pocket loss. Rather, as the Supreme Court has noted, administrative awards of monetary relief are constitutionally permissible if they serve to make the complainant whole. Thus in *Phelps Dodge Corp.* v. *National Labor Relations Board*, supra, where the Court upheld monetary relief (there, backpay), it explained the basis for its decision:

"Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces." 313 U.S. at 197.

Certainly, that rationale applies with equal force to monetary relief that would make whole the victims of housing discrimination.

In addition, a number of federal and state agencies have been assigned authority to award monetary relief as part of their administrative enforcement power. Thus, at the federal level, in addition to the NLRB, agencies such as the Interstate Commerce Commission and the Federal Mine Safety and Health Review Commission have been assigned such authority by Congress. Indeed, in connection with the 1977 amendments to the Mine Safety law, the Senate Report emphasized that the Commission was empowered to order "all relief that is necessary to make the complaining party whole," including "special damages sustained as a result of the discrimination."

At the state level, a number of fair housing agencies have been established, with specific authority to order monetary relief in the form of expenses and other out-of-pocket loss to the complainant. Indeed, in one state where monetary relief was not specifically authorized, the state Supreme Court nonetheless upheld the authority of the state fair housing agency to order such relief on grounds that it was necessary "to eradicate the cancer of discrimination." *Jackson v. Concord Company*, supra.

For these reasons, NCDH submits that authorizing HUD to award monetary relief to victims of housing discrimination, pursuant to its proposed enforcement powers, does not violate the Seventh Amendment.

NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING, INC.,

Washington, D.C., July 27, 1979.

Hon. BIRCH BAYH,
Chairman of the Subcommittee on the Constitution of the Committee on the Judiciary of the U.S. Senate, Russell Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: You will recall that when Robert C. Weaver, President of NCDH, testified before the Subcommittee in support of S. 506, he attached to his Statement several NCDH legal staff memoranda dealing with key issues raised by the bill. With the consent of the members of the Subcommittee, those memoranda were made a part of the Hearing record.

One of those memoranda dealt with the Constitutionality of providing monetary, make-whole relief to victims of housing discrimination through the administrative enforcement procedure that would be authorized under the proposed Title VIII Amendments. Our conclusion was that there is no Constitutional or other legal impediment to the award of such monetary relief.

We understand that recently, some question has been raised whether the fact that the administrative enforcement procedure would be superimposed on a pre-existing judicial enforcement procedure, establishing alternative enforcement mechanisms, presents a Constitutional problem. In light of the importance of providing make-whole administrative relief to victims of discrimination, we have conducted further legal research and prepared a supplement to our earlier memorandum. Our considered conclusion remains that there is no Constitutional impediment to the award of such monetary, make-whole relief.

I have enclosed ten copies of this supplemental memorandum and respectfully request that it be made a part of the Hearing record.

Sincerely,

MARTIN E. SLOANE,
General Counsel.

Enclosure.

SUPPLEMENT TO APPENDIX III

THE CONSTITUTIONALITY OF CREATING ALTERNATIVE JUDICIAL AND ADMINISTRATIVE ENFORCEMENT MECHANISMS TO VINDICATE RIGHTS PROTECTED BY THE FAIR HOUSING ACT OF 1968

NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING

MEMORANDUM

(By Martin E. Sloane and Christine L. Owens)

I. INTRODUCTION

On March 21 and April 25, 1979, Dr. Robert Weaver, President of NCDH, testified in support of the Fair Housing Act Amendments which had previously been introduced into both houses of Congress. In conjuction with his testimony, Dr. Weaver submitted three appendices prepared by the NCDH legal staff addressed to specific areas of concern.

Appendix III dealt with the constitutionality of authorizing HUD to award monetary, make-whole relief to victims of discriminatory housing practices in administrative proceedings instituted pursuant to proposed section 811. We stressed that the integrity of the proposed administrative enforcement procedure might well be undermined, absent authorization for HUD to award make-whole monetary relief to complainants as an integral part of the Secretary's final order. The memorandum dealt solely with the constitutionality of such an award.

Our conclusion was that, while no case had dealt with this precise point, relevant case-law strongly indicated that the Seventh Amendment jury trial requirement did not represent a constitutional impediment to authorizing the Secretary of HUD to award make-whole relief as a part of the administrative enforcement proceedings.

We, of course, were fully cognizant at that time that, under both existing law and the proposed Title VIII amendments, there was an alternative judicial remedy to secure the rights guaranteed by Title VIII. It is clear that an aggrieved person who pursues a judicial action for compensatory and/or punitive money damages is constitutionally entitled to a jury trial, as are all other parties to the proceeding. *Curtis* v. *Loether*, 415 U.S. 189 (1974). Our memorandum did not discuss this issue of alternative judicial and administrative remedies, mainly because this had not been raised as a matter of constitutional concern. In addition, our own preliminary research indicated that the existence of alternative remedies raises no serious constitutional questions. Apparently, there is now some concern that the requirement of a jury trial in judicial proceedings might render unconstitutional the provision for administrative enforcement proceedings, where a jury trial would be inappropriate. We have conducted further research into this issue and have concluded that the existence of alternative remedies—judicial and administrative—in no way impairs the Constitutional authority of HUD, through the administrative process, to award make-whole relief, including out-of-pocket loss, to victims of discriminatory housing practices.

This memorandum is a supplement to Appendix III, intended to analyze and explore the basis underlying our conclusion that the existence of alternative remedial provisions raises no constitutional impediment to the proposed Title VIII Amendments. Our conclusion follows in part from the existence of other statutes which provide directly for alternative enforcement routes. More importantly, an analysis of a well developed body of case law, largely in the areas of civil rights and labor law, demonstrates that an individual complainant may select a remedial mechanism of his or her choice in seeking legal redress for the violation of statutorily created rights. The selection of a remedial mechanism will often determine the forum utilized for redress, as well as applicable procedural safeguards and the types of remedies available. By the same token, Congress has ample constitutional authority to provide alternative remedial forums for redress of violations of fair housing and other civil rights laws. This is so even if the form of make-whole relief in both forums may be, in part, monetary.

In short, the existence of alternative remedial mechanisms in no way precludes an individual's reliance upon any one of the mechanisms designed to safeguard civil and other basic rights. Nor does the fact that the right to jury trial is required or authorized in one proceeding—judicial—require that it be accorded parties in an alternative proceeding—administrative— even where the proceedings redress identical grievances and provide identical remedies. Rather, with regard to each mechanism, the Constitution, as interpreted by the courts, requires only that the necessary safeguards applicable to that procedure be available to parties proceeding thereunder.

Accordingly, the fact that a jury trial is required under current and proposed Section 812 of the Fair Housing Act, providing for judicial enforcement, does not support the conclusion that such a requirement exists with regard to the award of full, make-whole relief under the proposed administrative enforcement procedures, thereby barring HUD from providing such relief as a part of its final order at the conclusion of an administrative hearing. Rather, our conclusion is that HUD may, consistent with the Constitution, provide the relief appropriate to remedy fully the injuries suffered by an aggrieved person, including monetary, make-whole relief.

II. Congress Has Enacted Statutes Which Provide, Alternatively, for Administrative and Judicial Enforcement of Rights Protected Thereunder

The proposed Title VIII Amendments would allow an aggrieved person to pursue either an administrative or judicial remedy for the injuries he or she has suffered as a result of a discriminatory housing practice. Review of analogous statutes indicates that provision of dual mechanisms for relief, while not commonplace, is by no means unique to the proposed Title VIII Amendments. Rather, Congress has frequently provided grievants with alternative avenues

to seek redress for injuries suffered as a result of violations of statutorily created rights.

For example, the Packers and Stockyards Act of 1921, 7 U.S.C. 181, et seq., provides that liability for violations of its substantive provisions can be enforced either by complaint to the Secretary of Agriculture, under section 210 of the Act, or by suit in the appropriate federal district court, 7 U.S.C. 209. The Act contemplates administrative procedures which include a hearing on the complaint, a finding of liability, and an order from the Secretary "directing the defendant to pay to the complainant the sum to which" s/he is entitled. This provision has been upheld against the claims of unconstitutional deprivation of the right to trial by jury, *Farmers' Livestock Commission v. United States*, 54 F. 2d 375 (7th Cir. 1931).

Similarly, the Communications Act of 1934, 47 U.S.C. 151 et seq., authorizes a person "claiming to be damaged by any common carrier subject to the provisions" of the Act to file a complaint with the Federal Communications Commission or to "bring suit for the recovery of damages for which such common carrier may be liable" in the appropriate district court, 47 U.S.C. 207. If after hearing on the administrative complaint, the Commission determines that the common carrier has engaged in practices in violation of the Act, it may enter an order directing the carrier "to pay to the complainant the sum to which he is entitled," 47 U.S.C. 209. Notably, section 207 includes an election of remedies requirement. Thus, no "person shall . . . have the right to pursue both" remedies. This is similar to the proposed Title VIII Amendments provision which would bar the aggrieved person from proceeding judicially after the Secretary has commenced a hearing on the record. Section 812(a)(3).[1]

Finally, the Congress has very recently enacted legislation—this time involving the ICC—which again provides dual avenues for rectifying violations of statutory rights. In the Revised Interstate Commerce Act, Public Law No. 95–473 (Sept. 26, 1978), Congress left intact provisions of the predecessor law which provided:

"A person may file a complaint with the Commission under section 11701(b) of this title or bring civil action under subsection (b) (1) or (2) of this section to enforce liability against a common carrier . . . subject to . . . this title." Public Law No. 95–473, § 11705(e)(1) (Sept. 26, 1978).

The Commission is empowered to investigate the complaint and order an award of the amount owing the injured person. Public Law 95–473, § 11705(e)(2). Again, there are no reported cases dealing with the constitutionality of this provision. There is nothing in the legislative history of the 1978 Act, however, which suggests that there was ever any question of the constitutionality of the alternative mechanisms.

Accordingly, there is nothing novel about legislation which provides for dual enforcement routes. And the fact of such dual mechanisms does not require that Congress assure identical procedural safeguards for each proceeding. This proposition becomes even clearer in light of case law surrounding the utilization by plaintiffs of alternative forums for challenging actions made unlawful by several statutes. In each instance, the alternative remedial forums relied upon by plaintiffs protected similar types of interests. In all cases, they served the purpose, not only of protecting the private plaintiff's interest in being free from discriminatory and other unlawful practices, but also of vindicating the greater public interests at stake.

III. Congress May Enact Dual and Overlapping Statutes, Involving Alternative Remedial Forums, for the Vindication of Protected Rights, Without Contravening Constitutional Requirements

As discussed in the preceding section, Congress has, in the past, chosen to provide for alternative enforcement mechanisms within the same statute. On other occasions, it has created a dual and overlapping statutory structure to assure the protection of important rights and full vindication of the public's interest in safeguarding those rights. Especially in the area of labor and civil rights legislation, Congress has evinced an intent to provide a wide variety of remedial mechanisms designed to prohibit discriminatory practices and compensate individuals for injuries suffered as a result of such practices. The Supreme Court has recognized and fully endorsed Congressional intent in this regard.

[1] There are no reported cases on the constitutionality of this dual proceeding under the Communications Act.

The Court has explicitly affirmed the overlapping authority of the National Labor Relations Board and state and federal courts to adjudicate certain complained of practices, despite the differing procedural safeguards accorded in each forum. Thus, in *Smith v. Evening News Association*, 371 U.S. 195 (1962), the Court upheld the constitutionality of Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. 185 et seq., which provides for direct suit in state or federal court for violations of collective bargaining agreements. In that case, the company claimed that contract breaches which were also unfair labor practices were solely within the jurisdiction of the NLRB.

One dissenting Justice found this claim persuasive, arguing that:

"[N]either prior decisions nor section 301 . . . require . . . that either employers or unions can be made to defend themselves against governmental regulation and sanctions of the same type for the same conduct by both courts and the labor board." 371 U.S. 202.

The Court, however, rejected this argument, stating:

"[T]he authority of the Board to deal with an unfair labor practice which also violates a collective bargaining agreement . . . is not exclusive and it does not destroy the jurisdiction of the courts under section 301." 371 U.S. 197.

The Court expressly stated that the dual scheme presented "no constitutional difficulty", 371 U.S. at 199. *Accord, Local 174 Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962).

Similarly, the Court later upheld the authority of the NLRB to remedy unfair labor practices which constituted violations of the National Labor Relations Act (NLRA), 29 U.S.C. 158 *et seq.*, even though the complained of practices were also breaches of a collective bargaining agreement, and as such, judicially remediable under section 301. *NLRB v. Strong* 393 U.S. 357 (1969). The Court's forceful language left no doubt that the dual remedial scheme created by Congress was entirely constitutional.

"[T]he business of the Board, among other things, is to adjudicate and remedy unfair labor practices. Its authority to do so is not affected by any other means of adjustment or prevention that has been established or may be established by agreement, law, or otherwise.' [cites omitted] . . . Hence, it has been made clear that in some circumstances the authority of the Board and the law of the contract are overlapping, concurrent regimes, neither pre-empting the other. . . .

"[T]he Board may proscribe conduct which is an unfair labor practice even though it is also a breach of contract remediable as such . . . in the courts." 393 U.S. 360–361 See also, *NLRB v. C & C Plywood*, 386 U.S. 939 (1967).

The Supreme Court has, similarly, unequivocally endorsed the validity of alternative judicial and administrative mechanisms for remedying violations of anti-discrimination in employment laws *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). In *Gardner-Denver*, the Court rejected the defendant employer's claim that submission to binding arbitration of a grievance based on violation of the non-discrimination provision of a collective bargaining agreement barred the employee from subsequently pursuing his Title VII right to a trial *de novo*, based on the same claim. Rather, the Court stated:

"Congress indicated that it considered the policy against discrimination to be of the 'highest priority.' [citations omitted] Consistent with this view, Title VII provides for consideration of employment discrimination claims in several forums. [citations omitted] And, in general, submission of a claim to one forum does not preclude a later submission to another." 415 U.S. 47–48.

The Court's decision was based in large part on the legislative history of the 1972 amendments to Title VII, specifically the debate surrounding an amendment introduced by Senator Hruska, which specified:

"Except as [otherwise] provided . . . a charge filed hereunder shall be the exclusive remedy of any person claiming to be aggrieved by an unlawful employment practice of an employer, employment agency, or labor organization."

Legislative History of the Equal Employment Opportunity Act of 1972, H.R. 1746, prepared by the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., at 1382 (1972).

Senator Hruska explained his concern that "the number of remedies now available and those provided" in the proposed bill would impose "unfairness, a great burden, and expense upon a respondent" because of the multiplicity of proceedings to which s/he would be subject, upon the allegation of a discriminatory employment practice. Id., at 1396. Specifically included was liability under the National Labor Relations Act, section 301 of the Labor Management Relations Act, the Equal Pay Act, 29 U.S.C. 206, and the Civil Rights Statutes, 42 U.S.C.

1981 and 1983. Senator Hruska noted that several different forums could consider the charge of employment discrimination: state fair employment practices commissions; the Equal Employment Opportunity Commission (EEOC); the NLRB; the Department of Labor, arbitrators, and courts. In addition, the Justice Department could institute pattern and practice litigation and the Office of Federal Contract Compliance could begin contract revocation proceedings, at the same time that the charging party was pursuing his or her individual claim. Id., at 1396–1397.

Countering these arguments, Senator Williams of New Jersey stressed that:

"[T]he purpose of this bill is to correct certain deficiencies in Title VIII and strengthen the national policy against employment discrimination. It is not our purpose to repeal existing civil rights laws. . . . [The proposed amendment] would severely weaken our overall effort to combat the presence of employment discrimination." Id., at 1402–1403.

Moreover, he noted approvingly:

"[T]he courts have repeatedly proposed a multi-faceted approach to employment discrimination, to bring to bear the full force of the law on this problem." *Ibid.*

In response to these arguments, the Senate voted overwhelmingly to reject Senator Hruska's amendment, thereby establishing unequivocally its intent that an aggrieved individual should have "all available resources" to combat employment discrimination. Id., at 1405–1407.

It was to this legislative history that the *Gardner-Denver* Court looked in determining that a Title VII plaintiff is entitled to pursue a variety of remedial mechanisms in vindicating his or her protected rights. This conclusion prevails even where the forums for adjudication of disputes differ, different procedural safeguards attach, or the remedies to be awarded by each forum are essentially the same. Specifically, the Court noted:

"If a given action should violate both Title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction." 415 U.S. 48.

Of course, proceedings before the Labor Board differ from those mandated for a Title VII civil action. While there is no right to a jury trial in either proceeding,[2] there are other constitutional safeguards applicable to all judicial proceedings which are not required in administrative hearings.

Yet the Court did not read the existence of alternative mechanisms for the vindication of identical rights as an attempt by Congress to circumvent the requirements of the Constitution. Nor, we submit, is there any reason to believe the Court would do so if the proposed Title VIII Amendments authorized the Secretary to award appropriate make-whole relief, including recovery for out-of-pocket loss, to the victims of discriminatory housing practices.

There are obvious differences between the alternative remedial mechanism affirmed in *Alexander* v. *Gardner-Denver*, and those proposed by the Title VIII Amendments. *Alexander* involved different, but overlapping, statutes, which created separate forums for the adjudication of claims. The Title VIII Amendments, by contrast, would establish alternative remedial mechanisms, utilizing different forums, in one statute. But the validity of the separate administrative and judicial forums does not depend on whether they are created by two overlapping statutes, or whether they co-exist within one. The distinction is not one of constitutional dimension; nor are we aware of any judicial decisions which have suggested that it is. And Congress has done both in the past.

Moreover, the statutes construed by the *Alexander* Court permitted a de novo court trial after administrative adjudication of the same claim. Nonetheless, the Supreme Court held that the administrative ruling was no bar to subsequent court adjudication of the same claim. By contrast, under the proposed Title VIII Amendments, charging parties would be required to select either litigation or the administrative process to vindicate his or her rights.[3] Unlike the situation pre-

[2] Compare *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (administrative award of backpay by the NLRB does not contravene the Seventh Amendment's requirement of trial by jury) with *Greater American Federal Savings & Loan Association, et al.* v. *Novotny* 47 L.W. 4681, 4683 (1979) in which the Supreme Court noted: "Because the Act [Title VII] expressly authorizes only equitable remedies, the courts have consistently held that neither party has a right to a jury trial."

[3] After commencement of the hearing under proposed Section 811, the charging party could not thereafter bring suit in Federal district court. Similarly, once a charging party filed suit under proposed 812, the Secretary would be barred from any further administrative proceedings base solely on the complainants' charge.

sented in *Alexander*, they could not pursue the alternative procedure if dissatisfied with the ruling in the one they initially selected. Thus, the case for the constitutionality of the proposed alternative enforcement mechanisms embodied in the Title VIII Amendments is made even stronger in light of the Court's decision in *Alexander v. Gardner-Denver*.

Thus, it is clear that the existence of alternative enforcement mechanisms, in itself, presents no constitutional barrier to enactment of the proposed Title VIII Amendments. Nor does the fact that a jury trial is required in one forum, while not required in the other, alter this conclusion

IV. The Requirement of a Jury Trial in Judicial Proceedings Where Traditional Legal Remedies Are Provided Does Not Render Unconstitutional Alternative Non-Jury Proceedings

The Seventh Amendment requires a jury trial in "suits at common law where the amount in controversy exceeds twenty dollars." The Supreme Court has interpreted the Amendment to require a jury trial where the relief sought is a "traditional, legal remedy." *Curtis v. Loether*, 415 U.S. 189 (1974). Where the statutory remedy is equitable in nature, however,[4] the jury trial requirement does not pertain, even if monetary relief is provided. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Greater American Federal Savings & Loan Association, et al. v. Novotny, supra*. Even where the remedy can in no sense be construed as "equitable", the Supreme Court has upheld the authority of Congress to empower administrative bodies to adjudicate disputes regarding violations of the law and to order the payment of money by the respondent. *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977).

In determining whether the Seventh Amendment acts as a bar to authorizing an administrative agency to award monetary relief, the Court has looked at a variety of factors, which were discussed in our previous memorandum. We shall not repeat our previous detailed discussion. However, because we believe the provision of make-whole monetary relief so important to the overall effective enforcement of the Fair Housing Act we believe it is appropriate to reiterate those factors which are relevant to determining the constitutionality of the proposed administrative proceedings. In addition, we wish to develop somewhat more fully our discussion of the nature of the remedy which the Secretary would be authorized to award.

A. The nature of the remedy—The "nature of the remedy" awarded by an administrative agency is one determinant of the constitutionality of the administrative forum. Thus, "legal" relief, in the form of compensatory and punitive money damages, often requires a jury trial. Where, however, a statute authorizes the award of only equitable remedies, a non-jury award of monetary relief is generally constitutional, regardless of whether the forum is administrative or judicial.

The monetary relief which the Secretary of HUD would be authorized to award under the proposed Amendments—out-of-pocket loss—is essentially equitable in nature. It is analogous to backpay in labor and employment discrimination cases. While clearly monetary in nature backpay has been uniformly interpreted by the courts as equitable relief. By the same token, the make-whole relief authorized by proposed section 811 would only compensate the victim of a discriminatory housing practice for out-of-pocket losses she/he had incurred as a result of the unlawful practice. As stated in our previous memorandum, the distinction between the make-whole monetary relief authorized in employment cases and that which the Secretary would award

is hardly one of constitutional dimension; rather, it reflects the differences between the nature of the injuries resulting from housing discrimination and those resulting from unfair labor practices.

Appendix III, Constitutionality of HUD Administrative Enforcement of Title VIII Through Provision of Monetary Relief to Complainants, pp. 10–11.

By contrast in a lawsuit under current and proposed section 812, a charging party would be authorized to recover full compensatory damages, including pain and suffering. *Harrison v. Hengeroth Mortgage Co.* 430 F. Supp. 893 (N.D. Ohio 1977) as well as punitive damages. In such an action there is no question that the Constitution requires a jury trial. *Curtis v. Loether*, supra. However, the requirement of a jury trial where "traditional, legal remedies" are available

[4] The monetary relief may also be characterized as "incidental" to equitable relief.

would not impair the constitutional authority of HUD to award appropriate equitable remedies, including monetary relief for out-of-pocket loss, in proceedings brought under proposed section 811. An analysis of labor and civil rights cases fully supports this conclusion.

Jury trials are available in proceedings brought under section 301 of the LMRA. *Genesco, Inc. v. Joint Council 13, United Shoe Workers of America*, 341 F.2d 482 (2d Cir. 1965). Section 301 proceedings, the courts have held, "essentially . . . contract actions for damages." *Stamps v. Michigan Teamsters Joint Council No. 43*, 431 F. Supp. 645 (E.D. Mich. 1977), where the remedy sought is a "traditional legal remedy—compensatory and punitive damages." *Minnis v. International Union, United Auto, Aerospace, etc.*, 531 F.2d 850 (8th Cir. 1975). By contrast, no jury trial is required in unfair labor practice proceedings before the NLRB. *NLRB v. Jones & Laughlin Steel Corp., supra*. This is true even where the Board adjudicates, as an unfair labor practice, a charge based on action that simultaneously constitutes a breach of the collective bargaining agreement, remediable as such in a section 301 judicial proceeding. But the remedy available to the NLRB is an award of backpay, traditionally deemed equitable in nature.[6]

Similarly, victims of discriminatory employment practices may allege violations of various remedial statutes, including Title VII, the Civil Rights statutes, and the Equal Pay Act. Alternatively, they may combine claims under all three. Violations of these employment discrimination statutes are redressed principally in judicial forums,[6] through lawsuits brought either by the aggrieved party or the EEOC. Though the forum is in all cases judicial, the proceedings, especially with regard to the right to jury trial, vary, depending on the nature of the relief that can be secured. Under Title VII, a number of lower courts have held that there is no right to a jury trial, because the proceedings are equitable in nature. *Greater American Federal Savings & Loan Association, et al. v. Novotny*, 47 L.W. 4681 (June 11, 1979). The relief to which Title VII plaintiffs are entitled, backpay, is considered a traditional equitable remedy. This is analogous to the backpay awarded by the NLRB in unfair labor practices proceedings. Thus, in Title VII proceedings, a court functions somewhat like an administrative agency authorized to award monetary make-whole relief.

The equitable nature of Title VII proceedings is underscored by the fact that Title VII plaintiffs may not recover punitive or compensatory damages. *Pearson v. Western Elec. Co., etc.*, 542 F.2d 1150 (10th Cir. 1976) and *Richardson v. Jones*, 551 F.2d 918 (3rd Cir. 1977). By contrast, complainants utilizing the Civil Rights statutes are entitled to a jury trial, because the relief available for violations—"actual, punitive and exemplary damages"—is a "traditional" legal remedy. *Marshall v. Electric Hose and Rubber Co.*, 413 F. Supp. 663 (D. Del. 1976) [suit under 42 U.S.C. 1981] and *Amburgey v. Cassedy*, 507 F.2d 628 (6th Cir. 1974) [suit under 42 U.S.C. 1983]. Again, the distinction between jury and non-jury proceedings exists despite the fact that the remedy ultimately awarded may be the same. Plaintiffs under Title VII, where no jury is required, are limited to an award of backpay alone. By contrast, plaintiffs proceeding under the Civil Rights statutes where there is a right to a jury trial, if requested, may recover not only backpay, but punitive and exemplary damages as well.

Under the proposed Title VIII Amendments, monetary relief in administrative proceedings would be limited to out-of-pocket loss, the functional equivalent to backpay in Title VII proceedings. There would be no provision for punitive or exemplary damages. Accordingly, the monetary relief would be equitable in nature and the jury trial right would not be applicable.

B. *Mandatory v. discretionary relief.*—Another factor that goes to determining the right to a jury trial is whether the relief is mandatory or discretionary. If mandatory, the courts have required a jury trial. If discretionary, they have not.

For example, the remedy available for violation of the Equal Pay Act—backpay—is identical to that authorized under Title VII.[7] Parties proceeding under the Equal Pay Act have a right to a jury trial. *Altman v. Stevens Fashion Fabrics,*

---

[5] Indeed, the Supreme Court, in *Smith v. Evening News Association*, characterized backpay as "damages," a term which traditionally connotes a "legal" remedy. A court in a section 301 proceeding may limits its award to backpay; it is not required to, however.

[6] A charging party, in pursuing a Title VII claim, must first file a charge with the EEOC. She/he is barred from instituting a judicial action until certain jurisdictional prerequisites have been met. There is no requirement of prior resort to the EEOC before instituting suit for violation for the Civil Rights statutes or the Equal Pay Act.

[7] Where violation of the Equal Pay Act is willful, the court may, in its discretion, award liquidated damages in an amount equal to the backpay award. 29 U.S.C. 260. The plaintiff, however, is not entitled to such damages as of right.

441 F. Supp. 1318 (N.D. Cal. 1977), even when the equal pay claim is joined with claim under Title VII, where no such right exists. *Hodgin v. Jefferson*, 447 F. Supp. 805 (D. Md. 1978). Because the remedy for violation of the Equal Pay Act is identical to that prescribed by Title VII, the rationale which underlies the requirement of a jury trial in cases under the Civil Rights statutes, where relief may include "actual, punitive, and exemplary damages," is not applicable to Equal Pay cases. Rather, in determining that the jury trial right exists in proceedings under the latter statute, the courts have relied on the mandatory nature of the relief provided under section 216 of the FLSA.

The Fair Labor Standards Act specifies two procedures for remedying violations of its substantive provisions. Under section 216 of the Act, an individual employee may bring suit directly in federal district court. If s/he prevails, s/he is entitled to a *mandatory* award of backpay. 20 U.S.C. 201, 216, *et seq.* Courts have consistently held that jury trials are required, upon motion, in 216 proceedings. *Lewis v. Times Publishing Co.*, 185 F. 2d 457 (5th Cir. 1950); *Wirtz v. Turner*, 330 F. 2d 11 (7th Cir. 1964); *Olcarchick v. American Steel Foundries*, 73 F. Supp. 273, 279 (W.D. Pa. 1946). The basis for this requirement has been explained in recent cases under the Age Discrimination in Employment Act (ADEA) and the Equal Pay Act. Both of these laws are governed, in their procedural application, by the FLSA. In *Lorillard v. Pons*, 98 S. Ct. 866 (1978), the Supreme Court stressed that the ADEA had adopted the language of the FLSA, to the effect that employers "shall be liable" for backpay. The mandatory nature of that liability removed the award of backpay from the realm of the judge's equitable discretion and necessitated a jury trial. By contrast, the Court noted that under Title VII, where jury trials are not required, "the availability of S. Ct. 872." Similarly, in *Altman v. Stevens Fashion Fabrics, supra*, the court stressed that:

"The lack of discretion concerning award of backpay under the FLSA indicates that EPA plaintiffs have a right to jury trial." 441 F. Supp. 1322.

Thus, in proceedings under section 216 of the FLSA, the Equal Pay Act, and the ADEA, it is the mandatory nature of the backpay award that necessitates a jury trial.

By contrast, parties to judicial proceedings instituted by the Secretary of Labor under section 217 of the FLSA are not entitled to jury trials. *Wirtz v. Jones*, 340 F. 2d 901 (5th Cir. 1965). Section 217 authorizes district courts "to restrain violations" of the Act's substantive provisions, including the "restraint of any withholding of payment of minimum wages or overtime compensation" found to be due to employees. Unlike proceedings under section 216, where the backpay award is mandatory, a judge in a section 217 proceeding has wide discretion in fashioning appropriate relief. *Brennan v. Saghatelian*, 514 F. 2d 619 (9th Cir. 1975). The Supreme Court has recognized and, apparently, endorsed the jury trial standards developed under the alternative enforcement sections of the FLSA. *Lorillard v. Pons, supra*, 98 S. Ct. at 840.

Under the proposed Title VIII Amendments, the relief that HUD could provide would be discretionary, not mandatory. Under the bill, HUD "may issue an order providing such relief as may be appropriate . . . ." The discretionary nature of the relief, even if monetary, further supports the proposition that jury trials need not be provided.

C. *Public or private interest.*—A third factor relied upon in determining the right to a jury trial is whether the interests which the administrative agency seeks to vindicate are public, as opposed to purely private. Thus, in an important labor law case, *Wirtz v. Jones, supra*, the Court of Appeals responded as follows to the argument that failure to provide a jury trial in section 217 proceedings violated the Seventh Amendment:

"[T]he purpose of the injunction to restrain the withholding of wages due is not to collect a debt . . . but *to correct a continuing offense against the public interest*. It is true that as a result, money may pass from the employer into the pocket of the employee or, if he is not available, then into the coffers of the United States Treasury, but that enforced payment . . . is simply a part of a reasonable and effective means which Congress, after trial and error, found it necesary to adopt to bring about general compliance with § 15(a)(2)." 340 F. 2d 904 [italic added].

Similarly, in *Wirtz v. Robert E. Bob Adair, Inc.*, 224 F. Supp. 750 (W.D. Ark. 1963), the court emphasized:

"[T]he action in the last analysis is not brought by the employees or for their personal benefit, except incidentally. *The Secretary is suing for the benefit* of the public *and to vindicate a public right.* . . . The relief sought is equitable and

it is no less so because compliance with the decree which plaintiff seeks may require the defendants to pay out money." 224 F. Supp. 736.

The Supreme Court has explicitly affirmed that this public interest criterion is of major significance in determining whether an administrative enforcement mechanism, which includes authorization to award monetary relief, is constitutional. *Atlas Roofing Co.* v. *Occupational Safety & Health Review Commission, supra; NLRB* v. *Jones & Laughlin Steel Corp., supra.* There is no question that under the proposed Title VIII Amendments, it is the public interest in ending housing discrimination that the law seeks to vindicate.

D. *Congressional intent.*—The courts frequently look to the intent of Congress in determining whether a jury trial is required. The importance of this factor was demonstrated in a recent Supreme Court decision.

In *Lorillard* v. *Pons, supra,* the Supreme Court stressed that a jury trial is required in ADEA proceedings because Congress made clear its intent, through statutory language and incorporation of FLSA enforcement procedures, that it intended such a result. Had there not been clear evidence of such a Congressional intent, the Court may well have determined that no jury trial was required under the ADEA, since the remedy for violation is backpay.

E. *Nature of the forum.*—The Supreme Court has also attached major significance to the forum selected by Congress for enforcement of statutory rights. Thus, in *Atlas Roofing,* the Court stated:

"The right to a jury trial turns not solely on the nature of the issue to be resolved but also on the forum in which it is to be resolved." 97 S. Ct. 1272.

The Court emphasized:

"This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned instead to a federal court of law instead of an administrative agency." Id., at 1269.

Similarly the Court in *Curtis* v. *Loether,* supra, stressed that its holding, in large measure, was based on the fact that section 812 proceedings are of the type traditionally cognizable in a court of law. The Court stated:

"When Congress provides for enforcement of statutory rights in an ordinary civil action . . . where there is obviously no functional justification for denying the jury trial right, a jury trial must be available." 415 U.S. 195.

Where there is such a functional justification, the Court strongly suggested that the jury trial right is inapplicable. The Court said:

"*Jones & Laughlin* . . . stands for the proposition that the Seventh Amendment is generally inapplicable in administrative proceedings where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the NLRB's role in the statutory scheme." *Id.,* at 194.

V. The Alternative Enforcement Mechanisms in the Proposed Title VIII Amendments Are Constitutional

The case law and analogous statutory enforcement mechanisms, discussed above, provide a basis for determining the constitutionality of the alternative remedial mechanisms proposed in the Title VIII amendments. As the above discussion shows, the courts have considered several relevant factors in determining whether a jury trial is required for the award of monetary make-whole relief.

First, the courts have considered the nature of the remedy. If the relief, even though monetary in form, is equitable in nature (such as an award of backpay in labor cases), then no jury trial is likely to be required. By contrast, if the authorized remedy is a traditional legal one, such as actual and punitive damages, a jury trial is probably mandated. This is so even if, in fact, the relief actually provided is equitable in nature, e.g., a backpay award. The fact that traditional legal relief is expressly authorized brings into play, the constitutional right to a jury trial.

Second, a jury trial is required if the statute directs that the plaintiff is mandatorily entitled to recover the relief sought, upon proof of a violation. By contrast, where the award is left within the equitable discretion of the judge or administrative agency, no jury trial is required.

Third, if the proceeding is instituted in the public, as opposed to purely private, interest, a jury trial is not constitutionally mandated.

Fourth, the courts look to expressions of Congressional intent in determining whether a right to a jury trial is required.

Fifth, the nature of the forum—administrative or judicial—is of key importance. If Congress selects an administrative forum for the enforcement of statutorily protected rights, no jury trial is required, since such a requirement is "incompatible with the whole concept of administrative adjudicaton and would substantially interfere with the [agency's] role in the statutory scheme." *Curtis v. Loether*, 415 U.S. at 194.

Measured against each of these factors, there would be no constitutional impediment to providing monetary relief to "aggrieved persons" through the proposed administrative enforcement procedure.

First, the monetary relief that could be provided would be limited to out-of-pocket loss. This is nothing more than "make-whole" relief, the functional equivalent, for housing purposes, of backpay awards awarded by the NLRB in labor law cases. Just as backpay, through monetary in form, has uniformly been held to be equitable relief, so is recovery for out-of-pocket loss for victims of housing discrimination. The administrative law judge (ALJ) would not be authorized to award traditional legal relief, such as recovery for other actual damages, including pain and suffering, no punitive damages. That relief could be provided only in the judicial forum, where the right to a jury trial is mandated. *Curtis v. Loether*, *supra*.

Second, the relief—monetary or otherwise—that would be provided under the proposed administrative enforcement procedure would not be mandatory, but would be pursuant to the equitable discretion of the ALJ. Under proposed section 811(a), the ALJ would be required to make findings of fact and conclusions of law, but would have wide discretion to provide "such relief as may be appropriate. . . ." Thus, the "aggrieved person" would not be entitled as of right to monetary relief in the event the ALJ found discrimination. Whether such monetary relief—limited in any case to out-of-pocket loss—would be provided would depend on the ALJ's discretionary judgment of whether it is appropriate in that particular case. The Supreme Court in *Curtis v. Loether*, *supra*, attached major significance to this distinction between permissive and mandatory awards of monetary relief. In distinguishing the requirements applicable to judicial proceedings under Title VII from those under section 812 of existing Title VIII, the Court noted:

"In Title VII cases the courts of appeals have characterized back pay as an integral part of an equitable remedy, a form of restitution. But the *statutory language* on which this characterization is based—

> "[T]he *court may* enjoin the respondent from engaging in such unlawful employment practice, and *order such affirmative action as may be appropriate*. . .,—

contrasts sharply with *§ 812's simple authorization of an action for actual and punitive damages*" 415 U.S. 197 [italic added].

The Court stressed that the decision to award backpay in Title VII actions is "committed to the discretion of the trial judge." Ibid. The Court found no such discretion in a section 812 suit. Rather, the Court stated that "if a plaintiff proves unlawful discrimination and actual damages, he is entitled to judgment for that amount." Ibid. Again, in *Lorillard v. Pons*, *supra*, the Court stressed the mandatory nature of the award of backpay in ADEA proceedings as a factor in requiring provision of a jury trial, upon motion.

Third, there is no question that, under the administrative enforcement procedure provided under the proposed Title VIII Amendments, HUD would be seeking to vindicate the public interest in eliminating housing discrimination. Indeed, the main importance of providing monetary, make-whole relief, in the form of recovery for out-of-pocket loss, to victims of unlawful housing discrimination is to help assure the continued viability and integrity of the administrative procedure as an effective enforcement mechanism. Just as it is in the public interest to eliminate housing discrimination through the relatively speedy and expeditious administrative process, so the continued effectiveness of the administrative enforcement process depends, in large part, on the willingness of housing discrimination victims to utilize it. By providing reasonable assurance that such victims can be made whole, including recovery for out-of-pocket loss, Congress would encourage wide use of the administrative enforcement mechanism, for purposes of vindicating the public interest.

Fourth, Congress, by expressly stating, either through statutory language or legislative history, that the monetary, make-whole relief is equitable in nature

and that no jury trial is contemplated, could make it clear that it relies heavily on administrative adjudication and that no right to jury trial is intended.

Fifth, Congress, through enactment of the proposed Title VIII Amendments, would select the administrative forum—where jury trials are "incompatible"—as the principal one for enforcement of Title VIII rights.

Thus, measured against each of the factors the courts have considered in determining applicability of the right to jury trial, the administrative award of monetary relief, in the form of recovery for out-of-pocket loss to victims of housing discrimination, is constitutionally sound.

Nor does the superimposing of the proposed administrative procedure on a pre-existing judicial remedy raise any additional constitutional questions. Where existing statutory and common-law remedies have proven inadequate, the Supreme Court has fully endorsed Congressional authority to enact new legislation creating administrative forums empowered to safeguard the public interest in protecting certain rights. *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977).

Indeed, when Congress enacted amendments to Title VII in 1972, it created a new and additional enforcement procedure, precisely because existing mechanisms—merely private suits by charging parties—had proved inadequate to fulfill the statute's purpose. Congress specifically considered two additional remedial mechanisms: EEOC Commission administrative proceedings, similar to those proposed for HUD in the Title VIII Amendments, and judicial actions by the EEOC on behalf of charging parties. Ultimately, Congress enacted the latter. This decision, however, was not based on any concern that enactment of an administrative enforcement procedure, where there was a pre-existing judicial mechanism, posed constitutional problems. Rather, advocates of both proposals were unanimous in their conviction that existing enforcement was inadequate and that an additional mechanism was necessary. Their only disagreement was with regard to the method which should be utilized. Thus, we submit that as long as the administrative scheme proposed by the Title VIII amendments is itself constitutional, the fact of a pre-existing judicial remedy is of no constitutional consequence.

VI. Conclusion

For all the aforementioned reasons, NCDH submits that the existence of alternative enforcement mechanisms within the Title VIII amendments presents no Constitutional impediment to Congress's delegating to HUD authority to award monetary relief to victims of discriminatory housing practices.

Congress has previously enacted legislation which explicitly includes alternative enforcement mechanisms. More frequently, Congress has created overlapping statutory schemes, designed to vindicate fully the public and private interests at stake in basic civil rights legislation.

The Supreme Court has upheld the Constitutionality of these overlapping schemes. And especially where an agency, or its head, acts in the public interest in bringing administrative or judicial proceedings against offendors, the existence of alternative private remedial provisions in no way undermines the validity of overlapping public enforcement measures. Nor is there any requirement that procedural safeguards applicable to suits by private parties be applied to proceedings instituted in the public interest.

Not only is it Constitutional for Congress to establish such alternative remedial mechanisms, it is necessary to assure that the promise of equal housing opportunity can be fulfilled. Senator Williams' comments with regard to the 1972 Title VII amendments are equally applicable to the proposed Title VIII amendments now before Congress:

"We are dealing with a problem in this country that needs all available resources to wipe from our land the terrible condition in which a human being can be and is discriminated against because of nothing that he had anything to do with—a discrimination that is based on race, color, religion, sex, or national origin. All available resources should be available to that individual." Legislative History Of the Equal Employment Opportunity Act of 1972, p. 1405.

No Constitutional barrier stands in the way of making those resources available to victims of discriminatory housing practices.

Senator SIMON. I thank you.

Secretary Weaver, in your statement you say—and unfortunately, I agree with you—"title VIII has not lived up to its promise of effectively attacking housing discrimination and significantly accelerating integrated patterns of residence".

If we do not include the discrimination against families with children as part of this, aren't we in fact creating another massive loophole for the present segregated housing patterns to continue?

Mr. WEAVER. Yes, I think so. I think that it is a pattern of really the same thing, only it is applied to a different segment of the population.

And these are intertwined because it involves largely low-income people, it involves very often minority people, and it involves the people who, for reasons other than not having children, are discriminated against, but this puts a double whammy on it, as it were.

And second, of course, from the point of view of social justice, and from a point of view of society, it is terribly important that the children have adequate housing.

I started out in public housing in 1934, and one of the things we were concerned about then was that better housing would give us better children, would give us better future citizens. So it is all intermeshed, in my opinion.

Senator SIMON. Thank you.

Professor Days, you heard the discussion about binding arbitration versus the administration law judge. Do you have any observations?

Mr. DAYS. Well, it is the first time I have heard it, but I do have some problems. First of all, as I understand the proposals coming from various quarters to increase the use of arbitration in the administrative process, they are not directed at cases like housing discrimination cases.

They are essentially the types of cases that lack precedential value, and would not be part of a process of vindicating important national policies, essentially in contractual or quasi-contractual situations.

For example, as I understand it, the ABA administrative law section has made such proposals, but it talks about those cases that would lack precedential value, and where the cases could be simply resolved, and I think would, by their definition, leave out a lot of problems that arise in the housing discrimination context, such as redlining, discriminatory appraisals, block busting, and I could go on.

So I have some reservations about that. On a theoretical plane, it seems to me that arbitration is not consistent with the significant, if not preeminent responsibility of the Federal Government, to address problems of discrimination in housing.

What this suggests to me, although obviously I have not studied the proposal very carefully, is shift to individuals once again the problem of resolving complaints of discrimination, rather than putting the Federal Government—as with the administrative law judge process—directly involved in that process, carrying the banner, if you will, for those who have reasonable cause for believing that they were discriminated against.

78-076 O - 88 - 15

And one can combine my practical concerns, and my theoretical concerns in one particular area, and that is attorneys, and whether counsel would be provided in a mandatory arbitration procedure. If not, it would really put people who are complaining about discrimination in housing at a clear disadvantage, given what I know about the nature of these cases, namely, often individuals going up against landlords or other sellers or renters of property that have the financial wherewithal to withstand and resist actions of this kind.

So, as I said, I have had very little opportunity to study this. I have great problems with the arbitration approach, and I think as some of the questions from the committee pointed out, it is not clear that it would be any more expeditious than the administrative law judge process, and would have the deficiencies that I was just describing.

Senator SIMON. Thank you. Mr. Sloane, one of the other proposals would deny fair housing groups standing in court. Does that significantly weaken the proposal?

Mr. SLOANE. Oh, yes, it does. Which proposal is this, Mr. Chairman?

Senator SIMON. One of my colleagues on the subcommittee has a proposal which would do that.

Mr. SLOANE. Yes. That would be a rather severe blow. The *Havens Realty* decision was a unanimous decision by the Supreme Court according fair housing centers standing to go into court on their own behalf.

In the past, they have been of great assistance to victims of discrimination, in a sense, in a hand-holding capacity, helping them through the difficulties and the intimidating aspects of court procedure, helping them to secure attorneys.

The *Havens Realty* case allowed them to go into court on their own, either as sole plaintiffs or as joint plaintiffs. In addition, it accorded testers standing if they were given misinformation, as they very frequently are. To do away with standing for fair housing groups would undermine a good portion of their strength and their force which they have been exhibiting over the last 5 years since the *Havens Realty* decision.

Senator SIMON. I thank all three of you for your testimony, and for your willingness to help provide leadership in this area where we clearly need strengthening of the law. Thank you very, very much.

Our final witness is the Chairman of the U.S. Commission on Civil Rights. Mr. Clarence Pendleton.

We are very pleased to have you with us here, Mr. Pendleton.

STATEMENT OF CLARENCE M. PENDLETON, JR., CHAIRMAN, U.S. COMMISSION ON CIVIL RIGHTS

Mr. PENDLETON. Thank you, Mr. Simon.

Mr. Chairman, I will not take much time since I heard your petition about a potential caucus.

Let me make this observation, that the Commission itself, as a body, has not had a chance to discuss this bill, and I would suggest that we have that as an agenda item for discussion later, and per-

haps my colleagues might come up with some flexible position. If not, then I am sure that they would be glad to advise the committee on their own as we have in other cases.

I do want to testify, I guess on my own behalf today, as Chairman of the Commission, and one thing I do want to do is submit for the record four copies of Commission reports in keeping with our mandate.

It was interesting to see Mr. Smolla had submitted his testimony that he gave to the Commission earlier, in 1985. We have a transcript of that last consultation. We have the papers as submitted.

We have a directory of State and local fair housing agencies, and an annotated bibliography of fair housing issues. There is one more I wanted to submit from a hearing in 1983. A consultation that pertains to the subject.

My testimony deals primarily with the whole matter of the definition of fair housing. We also discuss here the whole matter of the Hatch bill, the Equal Access bill that he has put through. We have talked about integration maintenance in the testimony, and we also ask for some understanding about the definition of fair housing, and the standard of proof of identifying housing discrimination.

I make some mention here about the ALJ system. We think it has some problems based upon a GAO report that came out earlier, and I leave the content of my testimony to the staff to look over that.

Mr. Chairman, I would like to make a couple other comments. As I have heard this morning's discussion, I would like to make a couple of suggestions.

One, perhaps the administrative conference ought to be asked to submit testimony, or testify before the subcommittee on the matter of the administrative law judges.

The other matter is that I think enforcement is extremely critical in this day and time, because as one who has spent some time in the housing business, I am concerned about the diminished supply of housing and the increased demand for housing.

Among the factors are the new tax law and how that impacts joint ventures. The depreciation schedules are certainly a very serious factor, and whether or not there are investors.

The potential for rent control is a factor, and I think zoning laws and regulations on a local level are another factor, notwithstanding the matter of integration maintenance that I think does violence to the Constitution, and certainly does great harm to those persons whom it stigmatizes, and especially blacks.

As has been said this morning, blacks and other minorities certainly are in need of housing. The costs of money will probably be an issue later.

With regard to familial status, the problem I see on the development side is that perhaps if developers have to build for families, they may not build for the elderly, because they could possibly get charged with housing discrimination against families in a development process.

If their unit is built for families, that over-houses senior citizens, and certainly units built for senior citizens would certainly not house families. And senior citizens cannot afford to be housed—I

think we see the problem in New York City right now, in terms of rent control and occupancy controls.

People cannot afford to move to smaller units because of the costs of developing the unit. I only mention these for discussion's sake, there is not enough time to get into that, but I would hope that the committee will understand that enforcement is only one side of the issue of providing housing. The other side has to be production, and without the number of units being produced, without the Government necessarily being into housing production, I think that enforcement is critical.

There can be all forms of discrimination in reduced units where there is less of a supply and more of a demand. The law does need to be strengthened. I commend the committee for its work and its concern in the enforcement area.

With that, Mr. Chairman, I will stop and respect your time schedule.

[The prepared statement of Mr. Pendleton follows:]

STATEMENT OF CLARENCE M. PENDLETON, JR.
CHAIRMAN
U.S. COMMISSION ON CIVIL RIGHTS
ON
S. 558, THE FAIR HOUSING AMENDMENTS ACT OF 1987
BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
U.S. SENATE

APRIL 7, 1987

I want to thank you for this opportunity to testify on S. 558, the Fair Housing Amendments Act of 1987. Housing discrimination in our society is of great concern to me and to my fellow Commissioners. However, since the Commissioners have not adopted a position on S. 558, I am testifying today on my own behalf and not on behalf of my colleagues.

The Commission on Civil Rights has had a longstanding concern over fair housing enforcement. During the past two years, for example, we published four volumes on fair housing. They were: a directory of State and local fair housing agencies; an annotated bibliography on selected fair housing issues; and two volumes stemming from the Commission's consultation/hearing on fair housing issues in November 1985. These publications were sent to each Member of Congress, in keeping with the Commission's mandate to apprise the Legislative Branch of civil rights matters.

At that consultation/hearing, the Commission received testimony from current and former Federal officials, social scientists, lawyers, State and local officials, and civil rights groups, on such questions as the causes of housing

segregation, legal issues in housing discrimination, racial occupancy controls, and Federal enforcement. Commission staff began work on a report designed to provide to the President, the Congress, and the public detailed information and the Commission's views on these important issues, but, due to a drastic reduction in the Commission's appropriation last year, work on this report regrettably had to be suspended.

In any event, I agree with the widely shared view that conciliation, as the existing system by which the Department of Housing and Urban Development (HUD) is authorized to resolve fair housing complaints, is inadequate to assure prompt and effective relief for victims of housing discrimination. I welcome Congressional efforts to correct this problem. However, I do wish to raise some concerns about the amendments proposed by the Kennedy bill.

First, the Fair Housing Act should include a definition of fair housing. It does not contain this threshhold definition, however; nor do the amendments proposed by S. 558. By fair housing do we mean equal opportunity in housing, or do we mean imposed racial balancing as a means to residential integration? Mention of both equal access and integration appears in the legislative history of the Fair Housing Act as well as in debates over amendments to that Act during the last decade. What these debates reflect is that fair housing meant open housing; an integrated society, although perceived, I believe, as the hopeful end of non-discrimination, was not

considered a mandated end. The distinction between the two is very important. Because what has happened in some instances is that racial integration has begun to take on a life of its own as a mandated end of the Fair Housing Act. In other words, what has happened is that social integration and race balancing is pursued by some to the exclusion of equal opportunity.

Integration may come about, of course, if all Americans can freely choose to live wherever they wish. Open housing may also produce minority concentrations. That may not be ideal, but it is far better than having the Federal Government engage in "integration maintenance," the most blatant example of which is the quota system adopted by the Starrett City housing complex in Brooklyn to keep the development from becoming all black. Quotas may achieve racially balanced, integrated housing, but loss of freedom is the price we pay. I simply do not think that that is fair housing to anyone.

Senator Orrin Hatch's bill, S. 867, defines fair housing as Government-enforced equal access to housing, not integration maintenance. Fair housing, according to this bill, means that

> individuals shall not be denied access to housing which they desire and can afford, because of race, color, religion, sex, handicap, or national origin. Such policy [the Government's fair housing policy] does not mean that any particular proportion of individuals of a particular race, color, religion, sex, handicap, or national origin will be assured housing within housing units, neighborhoods, or communities except as such proportions are the natural result of free housing choice.

I cannot think of a better way to define fair housing than the Hatch bill does.

Further, an important issue related to the definition of fair housing is the standard of proof in identifying housing discrimination. There is a conflict among the U.S. Courts of Appeal on the question whether the applicable standard is discriminatory intent or whether one can prove discrimination based upon effects or disparate impact. I suggest that use of the impact or effects standard creates a potential for mischief, such as rigid, basically exclusive reliance on statistical evidence for determining violations of Title VIII. S. 558 is silent on the issue of the applicable standard, and I thus favor the addition of clarifying language.

It is important that Congress address both what they mean by fair housing and what the appropriate standard of proof is as it considers amendments to the Fair Housing Act. If the history of Federal civil rights enforcement teaches any lesson, it is that the more broad and vague the statute, the greater the likelihood of protracted, fractious debate and litigation -- to the detriment of effective compliance with and enforcement of the law. Bear in mind, too, that the proposed amendments contain a provision for attorney's fees, which will doubtless fuel the litigation explosion that would ensue if the two questions I have raised are left unanswered.

In addition, several points should be made concerning the proposed administrative enforcement process under Title VIII.

5

Administrative hearings by Federal agencies have a lengthy history in the United States. The earliest agency adjudicative proceedings were authorized in 1789. 1/ By the 1880's the Interstate Commerce Commission had established an elaborate system for rate and regulatory hearings, and in the years that followed, other Federal agencies used "examiners," "hearing examiners," or "trial examiners" to preside over decisionmaking proceedings. 2/ In 1947 Congress enacted the Administrative Procedure Act that today in amended form guides agency hearings and administrative adjudications. 3/ Over 1,000 administrative law judges (ALJ's) are now employed by twenty-eight agencies. 4/ There is, therefore, a long record of the effectiveness of the ALJ system. In deliberating on this bill, this Subcommittee should carefully consider this record. None of the testimony to date on this bill has dealt adequately with this issue.

To be sure, the types of cases, substantive areas addressed, and the volume of cases handled at these twenty-eight agencies vary greatly. ALJs are not employed

---

1/ Kenneth Culp Davis, Administrative Law (St. Paul: West Publishing, 1973), p. 6.

2/ Ibid., p. 331.

3/ 5 U.S.C. §§554-559, 3105 (1982).

4/ Lubbers, Federal Agency Adjudication: Trying to See the Forest and the Trees, 31 Federal Bar News and Journal 383 (1984).

organizationally by a single agency but rather are attached to individual agencies. The agencies are specifically precluded from evaluating the performance of ALJs by terms of the Adminstrative Procedure Act. 5/ As the General Accounting Office (GAO) 6/ has noted, ALJs have "virtually guaranteed tenure until retirement," one reason why experience with the administrative enforcement approach deserves scrutiny when considering extending it to Title VIII.

A 1978 GAO study of administrative decisionmaking at Federal agencies also found that delays in resolving cases were a problem and that "over-formalization" of proceedings was often a factor in such delays. Individual agency procedures and performance varied considerably; some agencies appeared able to provide expeditious decisions while other performed less promptly, according to GAO. Although most hearings averaged one to five days in duration, the entire process of conducting a hearing, preparing a written decision, carrying it forward through final agency review and issuing it could total as many as 606 days or more. 7/ In addition, the Commission is aware of some frustration at the Office of Federal Contract

---

5/ General Accounting Office, Administrative Law Process: Better Management is Needed (1978), pp. 1-2.

6/ Ibid., p. iv.

7/ Ibid., pp. 11-19.

Compliance Programs (OFCCP) with the administrative enforcement process at the Labor Department. A former director complained that it was useless to refer equal employment enforcement cases for administrative action because that process takes too long to handle one. In her view, ALJs are "too slow' and the administrative enforcement process at Labor has been "badly managed." 8/

Moreover, the quality of complaint investigations by HUD staff would directly affect the ability of administrative law judges to enforce Title VIII efficiently. We know that at the Department of Labor, administrative enforcement of the Federal contract compliance program has been slowed because case files have had to be returned to OFCCP staff because of their inadequate development. 9/ By the same token, GAO has found poor investigative work at HUD, compounded by delays in case processing and resulting backlogs, due partly to inadequate staffing. 10/

Thus, the desired goals of the administrative enforcement process can be undercut by staff shortages and poor preparation of investigative case files. I raise these points, based on

---

8/ Ellen Shong Bergman, former director, OFCCP, staff interview, July 20, 1984.

9/ James Henry, Office of the Solicitor of Labor, Department of Labor, Staff Interview, August 26, 1985.

10/ GAO, Stronger Federal Enforcement Needed to Uphold Fair Housing Laws (1978), pp. 21-29.

continuing Commission staff monitoring of Federal civil rights enforcement, and GAO research as well, simply to emphasize that a new administrative enforcement mechanism to enforce Title VIII is not necessarily going to be a panacea for the flawed Federal fair housing enforcement effort.

This is not to suggest that I do not think reform is possible or necessary. Nothing could be further from the truth. Various proposals have been offered which, in my view, will strengthen Federal fair housing enforcement. Two of these proposals deserve serious consideration, namely:

(1) Senator Hatch's proposal to improve the conciliation process. Under the Hatch bill, the Attorney General is empowered to grant an aggrieved person up to $1000 for legal fees to initiate a civil action if a respondent refuses to conciliate. Such funds almost certainly would induce conciliation. The Hatch bill also protects the confidentiality of the conciliation process. Without such a guarantee, respondents -- rather than have their reputations tarnished -- might choose protracted, acrimonious proceedings. Of course, discriminating respondents may deserve to have their reputations tarnished, but not if that occurs at the expense of effective voluntary conciliation.

(2) Arbitration as an alternative dispute mechanism has been advocated by HUD. Unlike the ALJ system, which merely substitutes an article III trial judge with a trial court housed within the agency, I believe that arbitration could provide complete and efficient resolution of housing complaints.

Arbitration and the strengthening of the conciliation process are two examples of positive fair housing enforcement reform proposals. Others include increasing the scope of respondent's liability, and empowering the Secretary of HUD to initiate complaints. These seem preferable, in my view, to an ALJ system, which, in the area of civil rights enforcement, has a performance record open to question.

I hope and believe that constructive, overdue changes in Federal fair housing enforcement can be achieved soon. And I hope my comments today will contribute to that important goal.

Senator SIMON. I thank you, both for your statement, and for respecting the timeframe. First, on the matter of strengthening the Fair Housing Act, I think there is general agreement that we have to strengthen, and I appreciate that.

With regard to housing for the elderly, we do have an exemption in the proposal for housing for senior citizens.

Now, the bad thing about writing letters is that somebody always digs one out. Let me note a letter of October 6, 1983, which you wrote to Senator Mathias stating that "protection of familiar status is consistent with the Commission's broad position that discrimination should not be permitted to restrict housing choice".

You still favor——

Mr. PENDLETON. I have no problem with that, but I think that in the years that have ensued, and again, being in the housing business, I am trying to find out how do you do it. Do you do it just on a voucher system in one way, or who provides those units? And I think probably my free-market mind begins to come into play, come into focus here.

I think that statement is true, it was written in 1983, and I have no reason to change that. It is just how do you do it?

Senator SIMON. Let me just add one other point where I agree with you, and that is, we clearly have to produce more housing. We are hurting ourselves, down the line, in this whole area, by not producing additional housing.

We thank you, Mr. Pendleton, for your testimony.

The hearing stands adjourned.

[The subcommittee was adjourned at 12:07 p.m., subject to the call of the Chair.]

FAIR HOUSING AMENDMENTS ACT OF 1987

THURSDAY, APRIL 9, 1987

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:06 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Paul Simon presiding.

Also present: Senators Kennedy, and Specter.

Staff present: Deborah Leavy, chief counsel; Jeffrey Robinson, minority chief counsel; Cheryl G. Matcho, chief clerk; Margaret Morton, legislative fellow.

OPENING STATEMENT OF SENATOR KENNEDY

Senator KENNEDY. We will come to order.

As we begin this fourth day of hearings on the Kennedy-Specter fair housing bill, I think it would be useful to reflect for a moment on what we have heard thus far We have heard overwhelming evidence about the need to strengthen the fair housing laws and to extend their protection to the handicapped and to families with children.

Both Secretary Pierce and Mr. Reynolds told us the administration agrees that stronger enforcement tools are necessary.

We are heartened to learn the administration will not be sending up its bill from previous years that would have funneled enforcement through our already over-burdened Federal courts. The problem, however, is that the administration has abandoned its old, untenable proposal without adopting a tenable new one.

They are suggesting mandatory arbitration, but the Federal Government has never used mandatory arbitration as a means of handling enforcement actions brought under important Federal statues. When Mr. Reynolds testified before us on Tuesday, he referred to the Administrative Conference recommendations on mandatory arbitration. But those recommendations counsel against using mandatory arbitration in situations like Fair Housing Act cases, where a body of precedents to govern the cases must be developed through adjudication and where the matters to be resolved involve the implementation of important government policies.

In fact, the minutes of the Conference deliberations demonstrate that when Mr. Reynolds participated in the Conference deliberations, he stated that mandatory arbitration is, and I quote, "to be approached by Congress with the utmost caution."

An effective enforcement mechanism for fair housing is long overdue. We should not replace the tried and proven enforcement mechanism in the pending bill with the untried and unproven device of mandatory arbitration. Arbitration is a Trojan horse to undermine the important efforts to strengthen the fair housing laws. If the administration genuinely wants effective enforcement, the right solution is the use of administrative law judges.

Today we will hear from a number of distinguished witnesses, and I look forward to their testimony. We are very fortunate to have Bishop Malone as our first witness this morning. He is the Bishop of Youngstown, Ohio, testifying on behalf of the U.S. Catholic Conference in support of this bill.

We remember, Bishop Malone, that there was a snowstorm that interfered with your presence here on the first day of these hearings. Today, our distinguished chairman is announcing his candidacy for the Presidency. So we have interfered with his schedule today, but in any event, the debate goes on. The legislation will, I am sure, be passed out of this committee and enacted. We welcome you. We look forward to your testimony.

A PANEL CONSISTING OF JAMES W. MALONE, BISHOP OF YOUNGSTOWN, OH, ON BEHALF OF THE UNITED STATES CATHOLIC CONFERENCE; AND RONALD L. MACE, PRESIDENT, BARRIER FREE ENVIRONMENTS INC.

Bishop MALONE. Thank you, Senator. I apologize anew for my inability to appear at the scheduled time about a week ago, and I am very happy to have this occasion.

I have already filed with the committee an extended version of the remarks, and I would like to present briefly my concerns.

Senator KENNEDY. Yes. They will include all the statements in their entirety in the record.

Bishop MALONE. As you have stated, Senator, I am appearing before this subcommittee today to represent the United States Catholic Conference and to present our strong support for the Fair Housing Amendments Act of 1987. Legislation to provide an effective enforcement mechanism against unjust discrimination in housing is long overdue; and, therefore, I hope Congress will take prompt action on S. 558. I commend you, Mr. Chairman, for beginning the process, and I pledge the support of the United States Catholic Conference in working to see that this legislation is approved.

This legislation is needed precisely because the Fair Housing Act of 1968 is not working. There is extensive evidence that unjust housing discrimination continues to exist in our Nation. Indeed, it is widespread.

While the most blatant forms of housing discrimination, such as restrictive covenants, have been largely eliminated, other forms of exclusion and segregation are still commonplace practice in our society. Racial steering, redlining, discriminatory mortgage and lease restrictions, and providing false information to minority buyers or renters are among the techniques that are still often used against blacks, Hispanics, and other minorities in communities across the Nation.

This kind of discrimination is personally offensive to those involved and socially harmful for many different reasons. Ultimately, however, our opposition to such discrimination rests on the fact that it is morally wrong.

In the Catholic tradition our moral vision begins with the dignity of the human person. All persons are deserving of a special reverence because they are made in the image and likeness of God. To offend that human dignity is, therefore, in a very real sense, to offend against God.

Unjust discrimination on the basis of race is clearly a violation of the dignity of the human person and the basic rights which protect this dignity. Since discrimination in housing is an evidence form of this kind of racism, it must be labeled as morally wrong at both the personal and social level.

In 1979, our Conference of Bishops issued a pastoral letter on racism, in which we described racism as a sin. I believe it is appropriate to apply to discrimination in housing the same words we used to describe racism in general.

> Racism is a sin: A sin that divides the human family, blots out the image of God among specific members of that family, and violates the fundamental human dignity of those called to be children of the same Father.

It is on the basis of this vision of human dignity and equality that we bishops must condemn discrimination in housing and work to help create effective legal and institutional mechanisms to prevent it. This is precisely what S. 558 is intended to accomplish—to create an effective and efficient enforcement mechanism against housing discrimination.

It is widely recognized that the current law fails to provide adequate enforcement. Victims of housing discrimination can report violations to the Department of Housing and Urban Development, but HUD can do little to stop the violations. While the department has the authority to attempt to bring the two parties together for conciliation, this is clearly inadequate, as evidenced by the extensive discrimination that continues to exist in this field.

The bottom line in this discussion is effectiveness. Since the present enforcement mechanisms are clearly not adequate, the goal must be to establish a procedure that will assure prompt and effective redress for victims of housing discrimination. In our judgment, the Fair Housing Amendments Act of 1987 would do a great deal to meet this goal.

One of the most significant features of this legislation is that it would make it unlawful to refuse to rent or sell a housing unit to a family solely because of the presence of children. This is a distinct but very serious form of housing discrimination. It is appropriate that it be included under the provisions of the Fair Housing law. For it is not only a personal and family hardship for those involved, it is also a social injustice. For the good of both individuals and society, it should be made illegal.

To limit the housing choices available to families with children places an unjust burden on these families. It places a particularly severe hardship on single parent families. This kind of discrimination artificially inflates the price of housing for families and may even contribute to the growing homelessness among families with

children. Such housing bias constitutes a threat to the most basic unit of social organization, the family.

In the recent pastoral letter of the American bishops, "Economic Justice for All," we listed several key priorities by which all social policies should be governed. One of these deals specifically with family life. In the words of that letter, "Economic and social policies . . . should be continually evaluated in light of their impact on the strength and stability of family life. The long-range future of this Nation is intimately linked with the well-being of families, for the family is the most basic form of human community."

If we are to apply this principle, then surely we must find a remedy that will effectively prohibit discrimination against families with children.

In closing, I would emphasize that while housing bias is only one form of discrimination, it is clearly linked to many of the continuing civil rights problems in our Nation today. Where a person live impacts on education, employment, voting and other civic and social relations. To the extent that the rights of individuals and families are violated in the area of housing, they are also affected across the full range of civil rights.

The passage of these fair housing amendments will contribute in a very real way to the good of individuals and to the common good as well. It will be a necessary and appropriate reflection of our Nation's constitutional heritage that recognizes the equality, dignity, and inalienable rights of all its citizens.

Thank you.

[Prepared statement of Bishop Malone follows:]

TESTIMONY OF

MOST REVEREND JAMES W. MALONE
BISHOP OF YOUNGSTOWN, OHIO

ON BEHALF OF THE

UNITED STATES CATHOLIC CONFERENCE

I am pleased to appear before this Subcommittee today to represent the United States Catholic Conference and to express our strong support for the Fair Housing Amendments Act of 1987 (S. 558). Legislation to provide an effective enforcement mechanism against unjust discrimination in housing is long overdue; and therefore, I hope Congress will take prompt action on S. 558. I commend you, Mr. Chairman, for beginning the process, and I pledge the support of the United States Catholic Conference in working to see that this legislation is approved.

This legislation is needed precisely because the Fair Housing Act of 1968 is not working. There is extensive evidence that unjust housing discrimination continues to exist in our nation. Indeed, it is widespread. A recent survey commissioned by the Department of Housing and Urban Development estimated that black families looking for homes in metropolitan areas are likely to encounter discrimination almost half the time. Blacks looking for a place to rent have a 72 percent chance of encountering discrimination. Similar evidence of discrimination against other racial minorities is also extensive.

While the most blatant forms of housing discrimination, such as restrictive covenants, have been largely eliminated, other forms of exclusion and segregation are still commonplace practice in our society. Racial steering, redlining, discriminatory mortgage and lease restrictions, and providing false information to minority buyers or renters are among the techniques that are still often

used against blacks, Hispanics, and other minorities in communities across the nation.

This kind of discrimination is personally offensive to those involved and socially harmful for many different reasons. Ultimately, however, our opposition to such discrimination rests on the fact that it is morally wrong.

In the Catholic tradition our moral vision begins with the dignity of the human person. All persons are deserving of a special reverence because they are made in the image and likeness of God. To offend that human dignity is, therefore, in a very real way, to offend against God.

Unjust discrimination on the basis of race is clearly a violation of the dignity of the human person and the basic rights which protect this dignity. Since discrimination in housing is an evident form of this kind of racism, it must be labeled as morally wrong at both the personal and the social level.

In 1979 our Conference of Bishops issued a pastoral letter on racism, in which we described it as a sin. I believe it is appropriate to apply to discrimination in housing the same words we used to describe racism in general:

> Racism is a sin: a sin that divides the human family, blots out the image of God among specific members of that family, and violates the fundamental human dignity of those called to be children of the same Father. Racism is the sin that says some human beings are inherently superior and others essentially inferior because of race. It is the sin that makes racial characteristics the determining factor for the exercise of human rights. It mocks the words of Jesus: 'Treat others the way you would have them treat you.' (Matthew, 7:12)

It is on the basis of this vision of human dignity and equality that we must condemn discrimination in housing and work to help create effective legal and institutional mechanisms to prevent it. This is precisely what S. 558 is intended to accomplish - - to create an effective and efficient enforcement mechanism against housing discrimination.

It is widely recognized that the current law fails to provide adequate enforcement. Victims of housing discrimination can report violations to the Department of Housing and Urban Development, but HUD can do little to stop the violations. While the Department has the authority to attempt to bring the two parties together for conciliation, this is clearly inadequate, as evidenced by the extensive discrimination that continues to exist in this field.

It is true that under present law, a victim of housing discrimination can hire an attorney and bring a private law suit. However, this is clearly not a realistic option for most individuals. The time and money involved is simply too great an obstacle for them to pursue this course.

The bottom line in this discussion is effectiveness. Since the present enforcement mechanisms are clearly not adequate, the goal must be to establish a procedure that will assure prompt and effective redress for victims of housing discrimination. In our judgment the Fair Housing Amendments Act of 1987 would do a great deal to meet this goal. The Department of Housing and Urban Development would be able to investigate, initiate and process complaints alleging discriminatory housing practices in a much more prompt and efficient manner. This legislation would provide a number of options for victims of discrimination - - including conciliation by the parties involved, referral to a certified state or local agency, a hearing before an administrative law judge with rights of judicial review, and commencement of private civil actions as under present law.

In the end the legislation would ensure more prompt and effective action. It would put teeth into the law by speeding up the process and by providing tough but reasonable penalties in the case of violations.

I am pleased to note that S. 558 includes provisions that will make it unlawful to discriminate against handicapped persons. Discrimination by landlords prevents many such individuals from

finding housing in which they can live independently. As a result, they are forced to move into nursing homes or extended rehabilitation centers, or to live with their parents. Including persons with disabilities under the coverage of the Fair Housing Law will improve the chances for many such persons to live with the independence and dignity that they seek. In this regard I am pleased to point out that the National Catholic Office for Persons with Disabilities has also endorsed S. 558.

One of the most significant features of this legislation is that it would make it unlawful to refuse to rent or sell a housing unit to a family solely because of the presence of children. This is a distinct but very serious form of housing discrimination. It is appropriate that it be included under the provisions of the Fair Housing Law. For it is not only a personal and family hardship for those involved, it is also a social injustice. For the good of both individuals and society, it should be made illegal.

To limit the housing choices available to families with children places an unjust burden on these families. It places a particularly severe hardship on single parent families. This kind of discrimination artificially inflates the price of housing for families and may even contribute to the growing homelessness among families with children. Such housing bias constitutes a threat to the most basic unit of social organization.

In our recent pastoral letter, Economic Justice for All, we listed several key priorities by which all social policies should be governed. One of these deals specifically with family life. In the words of the pastoral letter,

> Economic and social policies . . . should be continually evaluated in light of their impact on the strength and stability of family life. The long-range future of this nation is intimately linked with the well-being of families, for the family is the most basic form of human community. (Economic Justice for All, #93)

If we are to apply this principle, then surely we must find a remedy that will effectively prohibit discrimination against families with children.

In closing, I would emphasize that while housing bias is only one form of discrimination, it is clearly linked to many of the continuing civil rights problems in our nation today. Where a person lives impacts on education, employment, voting and other civic and social relations. To the extent that the rights of individuals and families are violated in the area of housing opportunities, they are affected across the full range of civil rights.

The passage of these Fair Housing Amendments will contribute in a very real way to the good of individuals and to the common good as well. It will be a necessary and appropriate reflection of our nation's Constitutional heritage that recognizes the equality, dignity and inalienable rights of all its citizens.

Senator KENNEDY. Thank you, Bishop Malone.

We have heard testimony before our committee that discrimination against families really should not be a matter of Federal intervention. There are two points that are made against the provision discrimination against families. One is that there is not a problem; and, second, that this is really the creation of a new type of Federal presence interfering with the private interest.

I am most interested in your response to the second point. I think we have seen important evidence that there is discrimination against families. But why is this so invidious, do you feel?

Bishop MALONE. I think it is invidious because the families with children that form the basic unit of our society are across the nation facing discrimination when they are attempting to secure housing for their families.

I have anecdotal records of the evidence of discrimination, not only in the principal urban areas of our country—Connecticut, the metropolitan New York area, and in the high population areas of Florida and California—but also in smaller towns and communities, in cities like Utica, NY, for example, under 50,000; cities like Albany, under 100,000, where families seeking housing are routinely faced with discrimination either by the sign that says "This is an adult community," or by very effectively turning them away because children are not going to be admitted.

This is the basis for our interest. We feel that the redress that we need is a redress that can come most effectively from the provisions that are included in the amendments to the Housing Act.

Senator KENNEDY. But you think it is entirely appropriate that we develop a Federal policy barring discrimination against families? I mean, you think that that is an entirely appropriate area where we ought to be involved in?

Bishop MALONE. Yes. I support the notion of Federal legislation. I think the alternative proposal, to remand it to the States only, is to evade an issue which is clearly a major issue facing the Nation. And for redress, it seems to me Federal legislation is entirely appropriate.

Senator KENNEDY. Thank you. Mr. Ronald Mace, of North Carolina, testifying on behalf of the Barrier Free Environments and the United Cerebral Palsy Association. We welcome you here.

Mr. MACE. Thank you, Mr. Chairman.

STATEMENT OF RONALD L. MACE

Mr. MACE. Mr. Chairman, I am an architect, and I am president of Barrier Free Environments Inc., of Raleigh, NC. We are a firm that specializes in the design of buildings and products for use by both disabled and non-disabled people. We have 15 years of experience in this area, and in that time we have helped develop and implement State building codes, national and Federal design standards, and construction regulations for appropriate accessible housing as well as other buildings. We have provided design services and technical assistance nationwide on housing for disabled people. At the present time, I am project director for a 3-year research study on the problems of severely disabled people in housing. The project is called Less Restrictive Housing Environments for Severe-

ly Disabled People and is sponsored by the National Institute of Disability and Rehabilitation Research.

I am involved in this area both because I am a disabled person and a professional in the design and construction industry. There seems to be a need for people who are experienced on both sides of these issues. I am here today primarily to speak to some of the technical and cost issues that are inherent in the proposed amendments.

I would like first to commend the committee for their efforts in writing the amendments as you have and attempting to address the basic housing needs of disabled people. It is a milestone piece of legislation for disabled people, very definitely a positive step for all disabled people. But, as an architect and a disabled person, I do have some concerns, and I do believe that disabled people should not be required to incur additional costs to modify inaccessible housing in order to have a decent place to live.

I have submitted written testimony that is fairly detailed. I would like to have that included in the record, and I would like to focus the remainder of my comments, on the types of modifications or adaptations that may be necessary to accommodate disabled people in existing housing, their costs, and who should fairly pay.

Now, most housing stock in the United States is inaccessible to the portion of the disabled population who have mobility impairments. It is primarily inaccessible to them because of things like a single step at an entrance door, narrow doors to bathrooms and other spaces, and some devices such as light switches, thermostats and shelves that are too high to be reached by people who are short or seated.

Disabled people have been coping with this type of housing for years and finding it very difficult to find a place that is adequate for them to live. When faced with that type of housing, people have to find some way to adapt.

They adapt in two ways: One is with devices, equipment that can be added on to make some change in something that does not work well. And I have brought some of those to show you today.

The other way that people adapt is to adapt their life styles, to change what they would do, to work around the inadequacy of those facilities.

Most of the adoptive devices that I want to show you, are very inexpensive, and they are devices like this (Fig. 1). This is a set of special hinges; it is called an offset hinge. On a door to a bathroom, for example, that may be two inches too narrow for someone to get through with a wheelchair, these hinges can be substituted for the existing hinges, and they allow the door to swing out of the doorway when it is open. That increases the clear width by maybe two inches. A set of hinges like this costs, depending on where you buy them, $30 to $65 a pair. And if 2 inches is enough, sometimes this can suffice in place of removing the door and/or cutting the wall, a very much more expensive modification.

Some people cannot grip round doorknobs because they have hand dysfunctions. These (Fig. 2) are add-on lever handles that you can buy for $30 a set. They snap over an existing door knob turning it into a lever handle that most people can use.

Some people cannot reach existing light switches. This (Fig. 3) is a device that can be screwed on to an existing light switch plate. It has a handle that extends down below the switch allowing one to reach the low end and operate the light switch above. It costs about $6.

Some people will not be able to reach switches and controls for portable appliances. There are devices now with the electronic revolution that we are experiencing that can overcome this problem. This (Fig. 4) is a remote control device that you can purchase for $50, with modules of this type (Fig. 5) that you plug in. They require no modification to the building at all, and you can control lamps and appliances throughout the house from this one control panel.

There are other such devices including thermostat controllers, bathing devices and window and door operators and portable ramps.

I think it is right to expect some people to purchase some of these devices rather then make permanent modifications, but it is not right to expect people who cannot afford them to change their life styles in order to have a place to live. It is unlikely that most people will make major renovations to a rental piece of property which they do not own. If the bill remains as it is, most people will not make those renovations because of the expense.

In the rare instance where one must and can afford to make permanent structural changes, it is not right to penalize them for doing so by requiring that they also pay to remove the modifications on the way out. I would like to point out that some of the modifications that need to be made in housing units are permanent and a benefit to everyone.

Let us take, for example, door widening. If I must widen a bathroom door, and I pay for the widening of that door, the new door is what I would call a universally usable feature. After it has been replaced with a wider door, it is then a permanent fixture that can be used by anyone who then rents that unit in the future. There is no reason to take that door out at additional expense and replace it with a narrow one just to return it to its original condition.

There is no place to turn for any kind of support for a disabled individual to make either adaptations or modifications in a rental apartment unit. On the other hand, there is assistance for the building owner. Rental apartments are a business, and there is a public law that allows a tax deduction for business owners of $35,000 per year to make modifications for accessibility in their businesses. So there is precedent for the business, the owner, the manager of these units, to have some tax relief for making these kinds of changes. There is none for the disabled individual nor any other financial assistance with home modifications.

All of this leads me to the issue of building codes. We can now build housing that is universally usable, that can be used by people with any type of disability as well as able-bodied people. This type of housing does not look different, does not cost more, and can be used by almost everyone.

The one issue that I think most concerns me is that housing today is continuing to be built inaccessibly, and until that changes, we are going to have to deal with this difficult issue of who pays,

when they pay, how much they pay to modify and adapt inappropriate housing so disabled people can find a minimally adequate place to live.

At a very minimum, I think the amendments to this bill, as far as the costs are concerned, ought to first require that the owners of apartments in states where there are accessibility requirements ought to first have met those requirements before they are allowed to charge anyone for accessibility modifications to a rental unit.

With that, I will wrap up my comments. Thank you, sir.

[Prepared statement of Ronald Mace follows:]

TESTIMONY

RONALD L. MACE, AIA

PRESIDENT

BARRIER FREE ENVIRONMENTS, INC.

Mr. Chairman. My name is Ronald L. Mace, AIA. I am an architect and president of Barrier Free Environments, Inc. of Raleigh, N.C., a firm that specializes in the design of buildings and products for use by both disabled and non-disabled people. We have fifteen years of experience in design for disabled people. In that time we have helped develop and implement state building codes and national and federal design standards and construction regulations for appropriate accessible buildings. We have provided design services and technical assistance nationwide on housing for disabled people. At the present time I am the project director for a three year study on the problems and solutions to the problems of severely disabled people in housing. The project is called Less Restrictive Housing Environments for Severely Disabled People and is sponsored by the National Institute of Disability and Rehabilitation Research.

I am involved in this area because I am both a disabled person and a professional in the design and construction industry. There is a need for people who have experience on both sides of these issues. I am here today in support of several disability advocacy organizations to comment on some of the technical issues related to modifications in housing for disabled tenants. I am also here because I am one of the millions of disabled people who have experienced the type of discrimination this bill addresses.

This committee is to be commended for its efforts to address the basic housing needs of disabled people. Including disabled people in the Fair Housing Act is in itself a milestone for the disability movement. This legislation is an important step in the right direction; however, it is essential to recognize that it is only a step and that other steps will be necessary before equitable housing opportunities are available for all disabled people.

The current bill will prohibit housing owners and managers from arbitrarily denying a disabled person a place to live on the basis of

his or her "handicapping condition". It will particularly assure protection for those with physical disabilities who can afford and know how to make their own modifications for accessibility. However, the bill leaves low income, physically disabled people dependent upon the good will and assistance of others -- or right where they've always been.

No doubt as in the past, some landlords will make reasonable modifications for disabled tenants, others will negotiate arrangements with tenants, while others will use this self-pay requirement as a new form of discrimination.

The degree of difficulty this places on prospective tenants will vary depending upon their disability type and the dwelling unit design. The type of modifications necessary could vary from the no-cost removal of a door from its hinges to an elaborate kitchen renovation.

A recent interview with people responsible for conducting home assessments and modifications for access in existing housing in three locations revealed that the most frequently needed modification was widening a bathroom door. The second most frequent request was for some sort of change at the entrance; most often this required a ramp over an existing single step at the door. Except for these two, no other types of modifications were requested in large numbers; rather a variety of smaller items closely related to the individual's particular disability was requested.

There are several relatively low cost devices on the market to help people overcome deficiencies in their homes. Some examples follow:

- Add-on lever handles can be clamped onto existing round door knobs to make them usable by people having hand disabilities. These are available in both plastic or metal and cost approximately $30 per set.

- Automatic set back thermostat operators that can be programmed to adjust temperature settings for seven days and which can change interim settings to a simple one-button operation may be added to almost any existing thermostat for approximately $50. These are

helpful for people who cannot reach the thermostat as well as for those who lack the hand dexterity to set one.

- Offset hinges are specially made to increase door opening widths without requiring removal and replacement of the wall, door, and frame. The hinges move the door out of the opening when the door swings open, increasing the clear width up to 2 inches. The hinges sell for $29 to $65.

- Wireless electrical appliance controllers that are commonly sold as security devices for the remote control of lights throughout the home are excellent controls for mobility impaired people who may not be able to reach light switches, TVs, electronic equipment, and small appliances. The controllers are modular and one buys as many modules as needed for the number of fixtures requiring remote control. An operating control panel costs approximately $30 and each controller module sells for $15 to $20. Please note that these controllers are safe and adequate for everyday, general, non-life supporting use. Life support or safety equipment should only be connected to more elaborate environmental control systems with failsafe and back-up features intended for the purpose.

It is not likely that large numbers of physically disabled people are going to spend their money making extensive and permanent renovations to rental property they do not own. Instead most people will probably first try:

- Removing replaceable items that prevent adequate manuevering such as closet and bathroom doors and perhaps a set of base cabinet doors in the kitchen.

- Installing adaptive devices similar to those described above.

- Purchasing portable appliances such as microwave ovens, hotplates or toaster ovens to put on a low table to substitute for cabinet countertops and appliances that are out of safe reach.

- Modifying their lifestyle and activities of daily living to compensate for the inappropriate living facilities. This can involve, among other things, not bathing or bathing infrequently in a sink or when help is available because one cannot get to one's tub. It may involve living exclusively on expensive, less nutritious frozen food, or delaying toilet functions until someone is available to assist.

For those who fear this bill will result in damage to their apartments from extensive and poorly constructed modifications, I would point out again that the economics of the issue will prevent most people from undertaking serious renovations and that the alternative make-do approach to modifications generally affects features that are easily replaced at little or no expense. These temporary, replaceable modifications are not likely to become a financial hardship on landlords. This is especially true if the owners will assist the tenant in making the necessary changes and safely store any removed components for later replacement. In those rare instances when a disabled tenant can afford and is willing to invest in modifications, the owners it seems, for reasons of ownership, liability, and safety, will have to participate in the process. I suggest that, at this point, owners should look at the project as an opportunity to share the expenses and turn the unit into a universal one that can be used comfortably by disabled or non-disabled people and in the future be marketed to anyone.

As a professional architect and as a disabled individual, I do not believe that people with disabilities should be required to incur the costs of modifying inaccessible housing. I also worry about the extent to which such an assumption in federal law may function in an obstructionist way to financing and building code design improvements currently underway in some states. Therefore, to the extent that an individual is required to bear any of the modification costs for their housing, I concur with the request for clarification of Congressional intent as suggested by Marca Bristo last week.

In addition, I recommend the additional clarification that tenants not

could afford to incur the costs of modifying covered units in buildings which are out of compliance with state and local building design and accessibility requirements.

The proposed amendments to the Fair Housing Act go a long way toward ending the discrimination against disabled people in housing, and they do it in a manner that will not place financial burdens on the housing industry. The inability of most mobility impaired people to enjoy their way into appropriate housing will have to be overcome through other means. Clearly, some additional steps need to be made since even the temporary adaptations described above cost more than many disabled people can afford and there is nowhere to turn for assistance. Those who cannot afford to pay extra should not be forced to make lifestyle changes and to give up performing daily tasks that most of us take for granted.

One troubling fact that bothers me about this issue is that builders are today continuing to build housing that will need the same kinds of modifications in the future. If the industry were to change even small portions of the housing units they build, vast opportunities and savings would result. For example, a substitution in all housing against the narrow, 24" bathroom door would eliminate the most frequently needed modifications in the future, and it would not increase costs because the wall left out to install the wider door costs more than the door itself.

Because of advances in technology, design standards, and better products, we can now build most new housing that can be used by everyone without increasing its cost. Building such universally usable housing is the only sensible approach in view of the changes taking place in our population.

I applaud what you are doing with the amendments to the Fair Housing Act, and look forward to your assistance in shaping the next steps that will bring us closer to equity for all disabled people in housing. Thank you very much.

Senator KENNEDY. We have had important and impressive testimony that there continues to be discrimination against the handicapped. Do you find that to be the case as well?

Mr. MACE. Yes, very much so.

Senator KENNEDY. Do you find that the kinds of modifications that can be made in many instances are not excessive in terms of the cost, whether it is to be borne by the individual or the landlord? You have referenced some of them which I suppose you would have to consider to be modest in terms of expenditure.

Mr. MACE. Yes.

Senator KENNEDY. Do you find that there are a number of modifications that can be done relatively reasonably?

Mr. MACE. Yes. I think most of them can be. There is some evidence to prove that. We have recently surveyed at least three locations just within the past month where they have done fairly large numbers of home modifications. We found that the single most frequently requested change was the widening of a bathroom door. The second most frequently needed change was some sort of change at the entrance to the unit, usually a little ramp to go up the one step at the door.

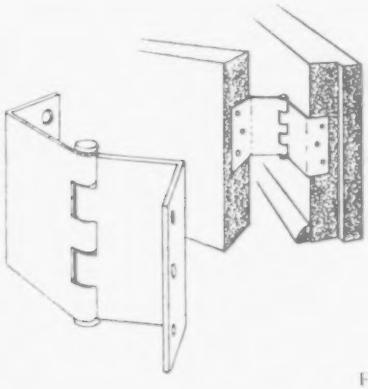
After that, the modifications tended to be taken care of by things like I have shown you here: devices to lower a light switch, something to operate a thermostat with, very modest. All of these modifications that I am talking about were done in those units for less than $900 total.

Senator KENNEDY. OK. Well, that is very helpful. What we are going to try and do is get some pictures of these various types of modifications so that we can refer to them in the record. I think that is important, and I think you make a powerful case that these modifications, in most instances, can be done very reasonably, and that any other changes or modifications, therefore, would not be that financially burdensome.

[The illustrations referred to above follow:]

78-076 O - 88 - 16

Illustrations of Adaptive Devices



Offset Door Hinge

Allows door to swing clear of opening, giving greater width for access.

Approximate Cost: $24.00

Availability: 247

Figure 1

Lever Handle for Doorknob

Makes grasping and pulling easier. Replacement for standard doorknob comes in variety of designs: T handle, extension lever, rubber bulb, and molded contour lever. Plastic, wood, aluminum, or rubber.

Approximate Cost: $4.00–$71.00

Availability: 28, 59, 87, 94, 122, 165, 230

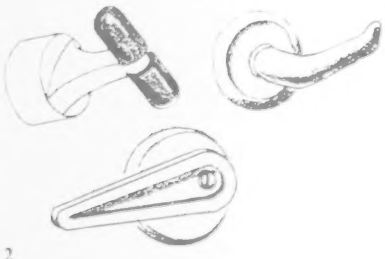


Figure 2

Light-Switch Extender

Rod provides access to light switch from sitting position. Handle attaches to light switch, and plastic box fits over top of switch. Operates by pushing up and pulling down.

Approximate Cost: $3.50–$4.00

Availability: 4, 94, 252

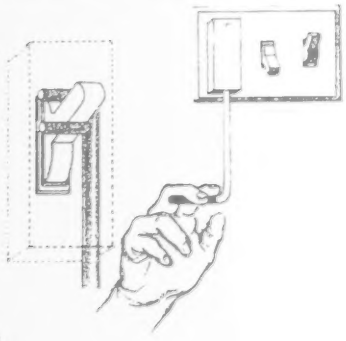


Figure 3

Environmental Control Unit

Allows user to turn electrical appliances or lights on or off from one location. Compact, boxlike unit centralizes control of up to 16 switches, depending on model. Keyboard-type buttons can be pushed with mouth stick, typing stick, or minimal finger pressure. Some models with loud call buzzer that can be plugged into unit and used to summon assistance. Typical size 4 3/4 inches × 3 1/2 inches × 3 1/2 inches.

Approximate Cost: $39.00–$160.00

Availability: 47, 231

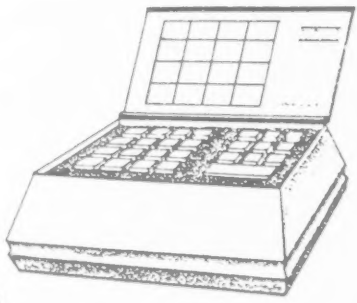
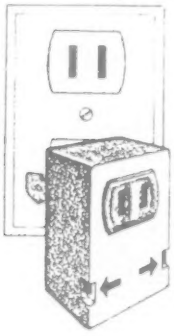


Figure 4



Lamp Module for Environmental Control Unit

Provides on and off switching and dimming of any two-pronged lamp plugged into module. Plugs into 110-volt AC outlet.

Approximate Cost: $15.00

Availability: 47

Figure 5

Illustrations and descriptions of these devices are from *The Gadget Book: Ingenious Devices for Easier Living*, edited by Dennis R. La Buda, and published by the American Association of Retired Persons.

Senator KENNEDY. But I have to, in fairness, say that this is not a grant bill. What we are really dealing with is discrimination. So, therefore, we approach this issue about what will be mandated and what will not be mandated in a cautious way. Many provisions I do not have problems with myself, but I think we are trying to focus this legislation just on the issues of discrimination against the families, handicapped and minorities.

So we would want to work with your association, and we want them to understand where we are coming from on it. We will try and do the best we can in terms of trying to strike down those barriers.

Yes?

Mr. MACE. I realize that this bill cannot cover all of these issues, particularly the financial aspect of them. I think I have no major problem with the bill as it is written. I think some changes can be negotiated between an apartment owner and the individual. And what those changes need to be is very variable. Some people will need almost nothing; some may need a few little things done. This is based on the history of it. We know this.

There has been some testimony that the person not only should pay, or participate in going into the unit, but then be required to remove them at their expense after the fact. If someone buys this equipment and they own it, they are going to take it with them when they go to use it in the next place they go. But if they have to make something permanent, they should not be penalized by having to then pay again to have it removed.

That was my major point.

Senator KENNEDY. Well, I suppose opponents will say, if a modification in some way diminishes or could be perceived as diminishing the value of the rental unit, the landlord would feel that——

Mr. MACE. I think, sir, that is a very common misconception. If you widen a door to a bathroom, it is a wide door. It looks just like another door, and everybody can go through it. I do not think it diminishes the value of that apartment at all.

As far as whether these things look different or not, if they are done properly—that is, if the owner gets involved in making the changes along with the individual—they have control over how well they are done, what they look like. Those are what we mean by universal changes—things that everybody can use from now on. It is the only thing that makes sense. If we continue to make very special, very different kinds of things, then I could justify saying that maybe damages the value of the property.

Senator KENNEDY. I think what you are talking about is probably about 95, 98 percent of the modifications.

Mr. MACE. They can be.

Senator KENNEDY. I agree with you. I think your testimony helps clarify that.

Mr. MACE. Thank you.

Senator KENNEDY. Senator Specter has joined us. Senator, we have heard from Bishop Malone, speaking to us from the Catholic Conference, and Ronald Mace from the Barrier Free Environments. I think they have had very helpful testimony.

Do you have any questions?

Senator SPECTER. Well, I do not have any. I am sorry that I could not be here earlier for your testimony. I have just been briefed by staff for a moment, and I think that we are on the same side of the issue.

I will be reviewing your testimony, but I do not think any questions are required.

Thank you very much, Mr. Chairman.

Senator KENNEDY. Thank you very much, Bishop Malone and Mr. Mace.

Bishop MALONE. Thank you.

Mr. MACE. Thank you.

Senator KENNEDY. We will proceed to our second panel, Jay Steven Levine, attorney from North Palm Beach, FL.

STATEMENT OF JAY STEVEN LEVINE, ATTORNEY, NORTH PALM BEACH, FL

Mr. LEVINE. Good morning, Mr. Chairman.

My name is Jay Steven Levine, an attorney from North Palm Beach, FL. My firm and myself specialize in representing community associations and also developers.

My main problem with this bill is its prohibition against creating an adult community and the ability of existing communities with age restrictions to enforce them. I am not concerned in the context of rental housing developments, but rather where there is ownership involved in similar communities like condominiums.

An adult community association community is one in which a person buys a unit, becomes a member of a mandatory community association, and there are deed restrictions running with the land, one of which restrictions limit age to anywhere between 12 and 50, depending upon the community.

The bill in its present form will make an adult community——

Senator SPECTER. It limits what, Mr. Levine?

Mr. LEVINE. It limits minimum age for permanent occupancy to anywhere from 12 to age 50; 18 is the average age.

The bill basically will destroy the adult community and make it an American relic of the past. Section 805 which is being added will make it illegal for developers to create new communities, and by adding the additional protected classes in subsections (a) through (e) of section 804, existing associations will be unable to enforce the existing restrictions in governing documents.

The exemptions in 807 do not help. They basically deal with retirement communities, which is not defined; referring to older persons, which is not defined; has no universal meaning, and talks about specially designed facilities, which again is not defined.

The typical adult community is not a retirement community and, therefore, will not enjoy the exemption. An adult community is usually people from the age 40 to 45 on up who have raised their children, they are out of the house now, and now they want to live in a community which does not have noisy children. I personally am a family person, have children and live in a family community, but there are those who feel differently than myself. They want to live with peers of their own age.

This bill really discriminates against older people, because generally older people are going to be living in adult communities. Statistically, 25 to 35 percent of all community associations in Florida are adult communities. I have added to the record an Orlando Sentinel article which substantiates that as 25 percent.

The U.S. population is getting older. Statistically half of the U.S. population will be living in a community association by the year 2000, so the demand for adult communities is going to increase as people get older and more and more move into these kind of communities. These people do want to live in an atmosphere of not having children in an adults-only atmosphere.

I have submitted today an article from the Golden Years Magazine which describes older Americans by age group, and even those different age groups have different needs. So compare younger people with older people, the needs differ between the age groups.

There is a case that I have submitted for the record of *White Egret Condominium* v. *Franklin*, a Florida Supreme Court decision and an appellate decision, which substantiate the needs differing between older persons in adult communities and younger persons in family communities. They have established a rational basis to have these communities discriminate or limit age.

The solution, I feel, is clear. Expand the exemption in 807 or define retirement communities to include adult communities in the housing forms I mentioned. I am not concerned about rental housing, but instead where you are buying a unit or buying a cooperative unit.

I am very happy to work with the committee to provide drafted language to 807 to expand this exemption. If the exemption is not expanded, this is the results I perceive: A major and increasing segment of older American population is going to be discriminated against because they are not going to be able to live in this housing of their choice. We are not talking about a suspect class or a fundamental right, being age. Therefore, a rational basis does exist.

Many builders only know how to build adult communities, particularly in Florida. Some will go out of business. Many may go out of business because their referral base is going to be lost. Many will face uncertainty on how to meet this new market. This translates to a loss of construction jobs as, of course, developers go under.

Developers are going to have to build extra amenities to appeal to all age groups. That means more costs. Also with more amenities, same space, there will be fewer units; fewer units means there is going to have to be a higher unit cost, and that translates to a higher price of units to the whole public. Now, the entire community is going to pay more money for housing because of these extra amenities which will be half used by the differing age groups. That is one reason why it makes sense to have an adult community or limit the amenities to those groups that will use them full time.

The issue boils down to one important principle for older Americans.

Senator KENNEDY. Is that true in North Palm Beach?

Mr. LEVINE. It is true in every county I am aware of in Florida, more so in southeast.

Senator KENNEDY. What evidence do you have of increased costs?

Mr. LEVINE. Talking to builders about having now to build, let us say, an additional small swimming pool for children instead of the one pool, for having to have——

Senator KENNEDY. Swimming pools?

Mr. LEVINE. That would be one additional. Where I live there is a large pool and a kiddie pool because I am in a family community. Those in an adult-only community would only have the one pool. You would have to have a larger area for the recreation area to support that.

Playground equipment, you would have to set aside additional areas.

Senator KENNEDY. Do you see anything in this legislation that mandates a smaller pool or a smaller playground?

Mr. LEVINE. No, but if anyone can live in a community of any age, the developers are going to want to attract all ages. It is just a matter of to try sell units, you are going to have to build what the next developer does not, and you are going to have put all these amenities in place.

Senator KENNEDY. So this puts pressure on the developers, undue pressure on the developers? They will have to build kiddie pools?

Mr. LEVINE. Well, my concern is now it is going to be reflected in higher costs to the units. I am not concerned about developers having now to build additional——

Senator KENNEDY. The free market will not answer that?

Mr. LEVINE. I think the free market is going to end up where everyone will be faced with more amenities, fewer units, and a higher price on the units. I am concerned about the consumer paying more, not the developer. If the developer is going to pay more, he is going to pass it on to consumers, the way it always happens; and not only the older consumer, but everyone in the community is going to pay more money for the price of housing.

The issue I think boils down to a freedom of choice of living environments which does not abrogate others 'fundamental constitutional rights.

Thank you.

Senator KENNEDY. Well, thank you, Mr. Levine. I do not have any other questions.

Senator SPECTER. Mr. Levine, what avenues might be presented by the exception which you propose which could lead to widespread circumvention of the thrust of the legislation to make housing available to families with children?

Mr. LEVINE. My understanding from the work I have done in the last week in connection with this bill is that the concern is the unavailability of rental housing to lower income or families with a lot of children. There is no shortage of housing that you can buy for families, at least not so in Florida, and Florida has more older persons than others.

Senator SPECTER. But we are looking here to rental housing. So the issue would be if an exception is carved out, as you have requested, to what extent would that provide a loophole——

Mr. LEVINE. It would——

Senator SPECTER. Let me finish the question.

Mr. LEVINE. Sorry.

Senator SPECTER. To what extent would that provide a loophole for avoiding the thrust of the legislation?

Mr. LEVINE. None, because I am proposing the exemption not include a rental apartment building, but only where you are buying a unit in fee simple, become a member of a mandatory association, underlying deed restrictions running with the land, and all the owners are also bound by restrictions.

Senator SPECTER. So there is no rental at all in those units.

Mr. LEVINE. No. I am not saying that. There are——

Senator SPECTER. Some of those units are rented by the owners who choose to rent them for a time.

Mr. LEVINE. Right. But, unfortunately, you have to have the same restrictions applying to the whole development.

Senator SPECTER. Are you suggesting that the exemption would apply both to sales so there would not be a requirement to have a sale to a family with children, but also to a rental of a family with children?

Mr. LEVINE. I am proposing to exempt the community that falls into this narrow definition, and then whatever activities are happening within that community——

Senator SPECTER. Both as to rental and as to purchase.

Mr. LEVINE. Right.

Senator SPECTER. And how do you define this narrow exemption?

Mr. LEVINE. All right. It is required to be a bona fide community association, where it is not like a landlord owning the building and renting out all the units, but each person buys in fee simple or obtains stock certificates in the case of a cooperative. So the owners are actually paying money to buy in. Each unit has a different owner, basically, although there may be some multiple ownership. There is deed restrictions running with the land that bind them as to use restrictions of all sorts, one of which would be limiting age.

I think I can carve out a narrow enough exception not to create the problem with someone looking to a rental housing development.

Senator SPECTER. And the age bracket is what, now?

Mr. LEVINE. Well, it varies. Anywhere from 12——

Senator SPECTER. What are you proposing?

Mr. LEVINE. Any limitation based on age.

Senator SPECTER. Well, what are you proposing?

Mr. LEVINE. A building may want to limit the age to age 40 if it is a much older group of people. Others may only want to limit to 12.

I am not sure it is necessary to say what age limitation.

Senator SPECTER. Is age 12 the age of somebody who can live in the premises?

Mr. LEVINE. Some developments are that. The trend is to have a higher minimum age, and 18 seems to be the average that the newer communities are coming with.

Senator SPECTER. So if they limit it from ages 12 to 40, somebody can buy it——

Mr. LEVINE. But could not permanently——

Senator SPECTER. Excuse me, excuse me. No one can buy it if they are over 40?

Mr. LEVINE. No, it is not title holding, but it is occupancy. Someone can be 20 and buy in, but the person to occupy the unit——

Senator SPECTER. Cannot be older than what?

Mr. LEVINE. Cannot be younger than the minimum age. It is not uniform——

Senator SPECTER. How about older, then? There is no limitation on the upper limits of age?

Mr. LEVINE. I have been asked that question, whether there is a rational basis to support that kind of an age limitation.

Senator SPECTER. Never mind the question about the rational basis.

Mr. LEVINE. OK.

Senator SPECTER. That is an interesting question, but it is a different question.

My question is, under the proposal you were making, is there a maximum age beyond which somebody would be disqualified from living in this kind of an arrangement?

Mr. LEVINE. No, sir.

Senator SPECTER. So that somebody 65 could buy in?

Mr. LEVINE. And live there. Yes, sir.

Senator SPECTER. And live there. The only limitation is the bottom age.

Mr. LEVINE. Correct.

Senator SPECTER. Buy in and live in.

Mr. LEVINE. Correct.

Senator SPECTER. OK. I think I have your point.

Mr. LEVINE. Thank you.

Senator SPECTER. I would make one suggestion. I think the kiddie pool analogy is not a very strong argument that you have. It might be that somebody by not putting a kiddie pool in would discourage people from wanting to rent who had children, which would reach your objective. So that the absence of a smaller pool would promote the objective you seek as a matter of the free market.

I think I understand what you are driving for, and I would just make the one comment about the quality of the argument on the kiddie pool.

Mr. LEVINE. Thank you.

Senator KENNEDY. Thanks very much.

Mr. LEVINE. Thank you for the opportunity.

[Prepared statement plus additional material submitted by Mr. Levine follows:]

JAY STEVEN LEVINE, P.A.
A PROFESSIONAL ASSOCIATION OF ATTORNEYS

North Palm Beach & Administrative Offices
The North Pointe Building
624 U.S. Highway One, Suite 310
North Palm Beach, Florida 33408
(305) 626-4700

Stuart
Commerce Plaza at Colorado Avenue
14 East Seventh Street, Suite 8
Stuart, Florida 33497
(305) 288-0124

Vero Beach
[illegible] Royal Palm Boulevard, Suite C
Vero Beach, Florida 32960
(305) 569-2405
Ft. Pierce Number **(305) 461-1499**

Boca Raton
NCNB Bank Building
2000 West Glades Road, Suite 206
Boca Raton, Florida 33431
(305) 394-3307

Jay Steven Levine
Edward Dicker
Jeffrey H. Frank

April 7, 1987

Reply to:
North Palm Beach

To: The Members of the Senate Judiciary Committee

RE: Position Statement in connection with testimony by Jay Steven Levine on April 9, 1987 before the Subcommittee on the Constitution, Senate Judiciary Committee

The proposed Senate Bill 558 in its current draft form will impact negatively upon adult communities.

An adult community is one in which underlying deed restrictions in the community prohibit the permanent residency of persons under a specified age (typically from 12 years to as much as 50 years of age). In the State of Florida alone, approximately 20-25 percent of the Community Associations (condominium, cooperative, homeowners and mobile homes) restrict the age for permanent residency.

Adult communities become favored as one approaches middle age, and is very much desired by individuals seeking to retire and live in peace and tranquility among peers of their own age. True, peace and tranquility may be achieved through the purchase of a single family house without a Community Association and without deed restrictions. However, the trend in the United States is for persons to purchase and live in cluster housing developments with shared facilities and a governing Community Association. In such an arrangement, maintenance-free living can be achieved through the Community Association being responsible for the upkeep of the exteriors of the living units and common properties. Statistically, it is expected that one-half of the U.S. population by the year 2000 will be living in Community Association developments. Peace and tranquility - and a freedom to choose one's peer group to ensure this - is now and will become increasingly desirable and important to more and more Americans. The key issue here is the right of people to make a choice as to which age group permanently lives in the Community. A choice which the proposed Act takes away.

The proposed draft form of the "Fair Housing Act of 1987" (Senate Bill 558) (hereinafter referred to as the "Act"), per Section 6, clearly will prohibit Developers from creating adult communities. This will then create a shortage of supply against increasing and excessive demand for these housing accommodations, with the demand then having to turn to existing adult communities. But this will still have little comfort for any hopes of adult community living, since the Act may preclude even existing adult communities.

Without an effective date in the Act, existing communities may well be prohibited from maintaining their adult status. And even with an effective date, Associations after the effective date may well be denied the right to enforce age restrictions in their Governing Documents. The Act in essence prohibits families with children from being discriminated against in the purchase or rental of a residence. Specifically, the Act prohibits discrimination by persons or other entities whose business "includes engaging" in residential real estate-related transactions, against families with children and covers those individuals or companies selling, brokering or appraising residential real property. The concern, however, is whether the Act, in the form that it now exists, applies to Association's which through legal means have a right to approve or disapprove a potential buyer or lessee. For instance, Community Associations typically have a clause in the underlying Governing Documents that any and all transfers of units within the Community, either by sale, gift, inheritance, or lease agreement, must be approved prior to the transfer becoming effective. In other words, the Board of Directors of Community Associations must approve of a potential buyer or lessee before the applicant will be allowed to reside within the Community. Would the Act proscribe such right of the Association to reject a purchaser or tenant because he or she has children under the permitted age? The Act in its present form may well prohibit such a right, which would be tantamount to denying a Community Association the right to enforce its Governing Documents. The net effect would be the gradual elimination of adult communities.

Would the Act in its present form prohibit an Association from filing an action in Court to enforce a minimum age restriction against someone who just purchased or leased a Unit? Again, the Act is so unclear that it may well extend to this situation. If so, the net effect would be the final death knell to the adult community - which would become an American relic of the 1980's.

One may argue that the exemption contained in the proposed draft of Section 805(d) addresses this issue. However, the language requires that, to be exempted, the dwellings must be in a bona fide retirement community designed and operated for older persons or dwellings otherwise intended or operated exclusively for such older persons and equipped with facilities and amenities specifically designed to meet

the physical and social needs of such persons. This exemption appears to exempt retirement homes which have medical facilities on the premises, meals provided on a daily basis, etc. The typical adult communities are not equipped in such a manner as to bring them within the ambit of the exemption. Without a good clear definition of a "bona fide retirement community", it is impossible for any Community Association to know whether or not it is covered by the Act.

What is the answer to this problem? It is very simple. The exemption in the Act should be expanded to include adult communities. The issue of whether community associations should be allowed to be exempted from this Act is easily presented. Oftentimes, the Owners in Community Associations amend their Governing Documents to limit the age for residency. Other times, the unit owners have bought a Unit specifically knowing that the Developer created a community where the Governing Documents prohibit children from residing in the Community on a permanent basis. These individual Associations and Unit Owners, whether they be condominiums, cooperatives, homes, or mobile homes, have pursued their freedom of choice to live where they want and by the rules they want, which rules include no children living there on a permanent basis. This is not to say that one has the freedom to live in housing accommodations which discriminate in violation of the U.S. Constitution. One's freedom of choice stops there. As I present below, "age" limitations are not violative of the Constitution and as such, as proper subjects for a person's freedom of choice. It is argued that the Act protects the right of families to live in housing accommodations with their children. Such a right needs to be protected where there is a shortage of housing accommodations which permit children. There is no such shortage nationwide. Statistically, there are many more non-adult communities than adult communities. Just as families may wish to choose to live in housing accommodations which allow children, older persons should have the same right to live among peers of their own age. Because there is no shortage, there is no justification to deny the freedom of choice.

The Constitutionality of permitting age restrictions is an important issue. For if such restrictions are unconstitutional, then the matter rests there. However, age restrictions are Constitutional. Therefore, the Federal Government ought not to enact legislation which is not needed to assure housing for families with children, which denies a practice which is perfectly legal from a Constitutional perspective, and which will have such a detrimental impact on a growing segment of the American population.

Restriction on individual rights on the basis of age need not pass the "strict scrutiny" test because age is not a suspect classification. The test for determining whether an age restriction denies due process or equal protection is whether the restriction under particular circumstances of the case is reasonable and whether it is discriminatory, arbitrary or oppressive in its application.

The Federal Courts have held repeatedly that age itself is not a suspect classification even where State action results in the mandatory retirement of policemen at age fifty (See Massachusetts Board of Retirement vs. Murgia, 427 U.S. 307 96 S.Ct. 2562, 49 L.Ed. 520 (1976). Thus, it logically follows that an age restriction eminating from a private contract would be less suspect provided, of course, that it has a rational basis. Therefore, the question to be addressed is whether the line drawn between childhood and adulthood has a rational basis.

As Justice Letts of the Fourth District Court in the State of Florida so eloquently stated,

> "Nature itself biologically provides that that only younger adults can procreate. It is axiomatic that catabolism in the old results in physical and mental frailties which render them not only incapable of reproduction but also incompetent to withstand the rough, tumble and noise of rampaging youngsters - inevitable accompaniments to the normal rearing of young children. For this very reason, kids are commonly barred from hospitals. Sick people need peace and quiet and so do old people who lose their erstwhile resilience to turmoil and commotion. Indeed, tranquility is a must for the mental health of older people and I would allow them to have it. So would the only other two Florida decisions that have so far touched on the question." (Citations omitted.)

Franklin vs. White Egret Condominum, Inc. 358 So.2d 1084 (Fla. 4th DCA 1977)(Dissenting opinion of Justice Letts); cf., White Egret Condominium, Inc. vs. Franklin, 379 So.2d 346 (Fla. 1979).

Age restrictions are a reasonable means to identify and categorize the varying desires of our population. For example, residential units are designed specifically for young adults, for families with young children and for older persons. The designs and demands for each category are different. For example, units for young adults are usually one (1) or two (2) bedroom units with extensive recreational facilities designed for the young, such as tennis and racquetball courts, weight rooms, saunas and even night club facilities. The units designed principally for families with children are two to four bedroom units with recreational facilities geared for children including playgrounds and small childrens' swimming pools sometimes with lifeguards.

Adult Communities, on the other hand, usually contain small units (one to two bedroom units) designed to provide the quiet atmosphere that most older persons desire and deserve. These units may provide amenities for individuals limited to recreational facilities such as cardrooms and shuffleboard courts. Other facilities might include a clubhouse with amenities not geared to young children. Other facilities might include those geared to persons with wheelchairs and walkers. Although playgrounds and "kiddie pools" may be desirable for younger tenants and owners, such facilities would be largely unused in a development which caters to older persons, and as such, would not be made available by Developers who create adult communities. Therefore, one cannot ignore the fact that some housing complexes are specifically designed for certain age groups.

The Act's effect of outlawing adult communities will be drastic. Population groups who tend to migrate to States such as Florida for adult community living will alter their patterns of migration. Many home builders in Florida and elsewhere will be negatively affected for this reason. Builders will be faced with uncertainty of how to structure amenities to appeal to all age groups at once. More square footage will have to be devoted to recreational amenities to accommodate all age groups, with the result being less unit square footage in the aggregate per Community, and thereby a higher Unit cost. As usual, the burden will fall on all home buyer consumers in the way of a higher price for the Unit.

Condominium, cooperative, mobile home and homeowner associations promote the health, happiness and peace of mind of the majority of the unit owners since they are living in such close proximity and using the same facilities. As a result, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate and privately owned houses. They voluntarily give up the freedom, but, when they do so, they specifically agree to abide by the Declaration, By-Laws or other documents which create the governing entity in which they are members. The free choice people make when they purchase a unit within a Community which prohibits children, which is an election to live within that community without those inconveniences associated with children, must be preserved.

Restrictions in communities based on age, as outlined above, is reasonable and should not be legislated out of society. Such restrictions serve a useful purpose as does mandatory retirement requirements in government jobs. This useful purpose is the very basis for the Community Association - complexes specifically designated for certain age groups and promotion of health, happiness and peace of mind of the majority of unit owners living within the small compact community they all share. Thus, one could say Community Associations have a constitutional right to discriminate so long as same does not offend the Constitution.

Age restrictions do not deny housing to families with children. There are far many more housing communities which permit children without any restriction based upon age, than those which do not. Again, there is no shortage of housing for families with children. Without a compelling need to overcome a housing shortage, there is no justification for Congress to deny an older person the freedom to live in an adult community.

Our position is not that we are against prohibiting restrictions against families with children. We are, however, against an across-the-board prohibition of community associations having freedom of choice. These associations whose documents disallow such classes of people from residing within the community have done so legally; the owners and tenants within the community have heretofore agreed with these restrictions. To now turn around and restrict those individuals and require that they live in communities that allow children would destroy their freedom of choice to live among peers of their own age.

This Firm represents in excess of 100 Community Associations. Since the Firm has become aware of this Act, all clients of the Firm which are adult communities and who have been contacted have expressed strong support that the Act be modified to exempt adult communities.

I enclose herewith a biography with respect to myself to give you background information as I testify before the Sub-Committee on the Constitution, Senate Judiciary Committee.

Respectfully submitted,

Jay Steven Levine

Jay Steven Levine

JSL/rvb

R:ADULT/1

BIOGRAPHY

Jay Steven Levine, Esquire

JAY STEVEN LEVINE, P.A.

Addresses:

824 U.S. Highway One
Suite 310
North Palm Beach, FL 33410

70 Royal Palm Blvd.
Suite C
Vero Beach, FL 32960

14 East 7th Street
Suite 8
Stuart, FL 33490

2000 West Glades Road
Suite 206
Boca Raton, FL 33431

Mr. Levine is the Senior Member of the Firm. He received his B.A. degree in Economics, magna cum laude in 1973 from State University of New York at Albany and his J.D. in 1976 from the University of Miami School of Law. He was admitted to the Florida Bar in 1976; and admitted to Practice in the District of Columbia Court of Appeals, Washington, D.C. and U.S. District Court--Southern District--Florida in 1979. He is a Member of the Palm Beach County Bar Association; Indian River County Bar Association; Condominium and Planned Development Committee, Florida Bar--Vice Chairman, Education Sub-Committee. He is Past President, Gold Coast Chapter, Palm Beach County, Community Association Institute. He is also a Member of the Liason Sub-committee, Condominium and Planned Development Committee to the Division of Florida Land Sales, Condominiums and Mobile Homes. Mr. Levine has been a guest lecturer at Palm Beach Junior College and has been invited lecturer and principal speaker on Condominium and Homeowners Association Law at locations from Florida to California, including at many Community Associations Institute (CAI) meetings and workshops.

Marvin FRANKLIN and Norman Franklin, Appellants,

v.

WHITE EGRET CONDOMINIUM, INC., a non-profit Florida Corporation, Appellee.

No. 76-1535.

District Court of Appeal of Florida, Fourth District.

Aug. 9, 1977.

Rehearing Denied May 31, 1978.

Sale of a condominium apartment was made to one purchaser whose application had been approved by condominium association, and he conveyed half his interest in apartment to his brother. Condominium association brought suit seeking declaratory judgment that transfer was void. Brothers' request for jury trial was denied, and the Circuit Court for Broward County, Gene Fischer, J., entered final judgment setting aside transfer by deed. Brothers appealed. The District Court of Appeal, Kovachevich, Elizabeth A., Associate Judge, held that: (1) ownership of an apartment by two blood brothers was permissible under condominium articles; (2) purchaser and brother met restriction that apartment was to be used only as a "single family residence"; (3) transfer by purchaser of one-half interest in apartment to brother did not require approval of association; (4) condominium article prohibiting children under age 12 from residing on premises was unconstitutional, and (5) trial court did not err in refusing jury trial.

On petition for rehearing, the court, Cross, J., held that action of condominium association in seeking to invoke powers of trial court to compel reconveyance of interest in condominium apartment enabled the court to pass on question whether restrictive covenant violated Fourteenth Amendment.

Letts, J., dissented and filed opinion.

Affirmed in part, reversed in part, and remanded with directions.

1. **Estates** ⇐11

Where condominium articles specifically allowed joint ownership of apartments and made no limitation upon amount of owners or character of ownership group, ownership of an apartment by two blood brothers was permissible.

2. **Covenants** ⇐49

Provision of condominium articles which prohibited use of condominium apartment for any purpose other than as a "single family residence," being a restriction on free use of property, was to be strictly construed in favor of free and unrestricted use of real property.

See publication Words and Phrases for other judicial constructions and definitions.

3. **Covenants** ⇐49

A restrictive covenant must be read in context of entire document in which it is contained.

4. **Covenants** ⇐103(1)

Restriction in condominium articles that apartments were to be used for no purpose other than as a "single family residence", taken in context of joint ownership provision, was met by two brothers who jointly owned apartment, even if they constituted two separate families, in that each of brothers alternated their stays on premises and use to which they put apartment was that of a single-family dwelling.

See publication Words and Phrases for other judicial constructions and definitions.

5. **Covenants** ⇐92

Where condominium articles specifically allowed transfer of apartment to member of "immediate family," without approval of association, conveyance by purchaser of apartment of an undivided one-half interest in apartment to his brother was valid despite failure to seek approval of condominium association.

6. **Constitutional Law** ⇐82(9), 242.1
Estates ⇐11

Condominium article prohibiting children under age of 12 from residing on con-

condominium premises was an unconstitutional violation of apartment purchaser's rights to marry and procreate; furthermore, no compelling reason was shown for the prohibition, and fact that condominium association provided for designation of children guests and had certain families with children under 12 residing on premises made enforcement of restriction unreasonably selective and arbitrary and thus a violation of equal protection. U.S.C.A.Const. Amend. 14.

7. Jury ⇐18

In action by condominium association seeking declaratory judgment that transfer by apartment purchaser of one-half interest in apartment to his brother was void, trial court did not err in refusing to grant brothers' motions for jury trial, in that question for determination involved title to real property, no claim or counterclaim was made for damages or any other common-law issue, and jury trial, if affordable at all, was subject to discretion of trial court.

On Petition for Rehearing

8. Constitutional Law ⇐213(4)

So long as objectives of restrictive covenants contained in condominium documents are effected by voluntary adherence to their terms, no state action would be involved, and no rights protected by Fourteenth Amendment to the United States Constitution could be said to have been violated. U.S.C.A.Const. Amend. 14.

9. Constitutional Law ⇐213(4)

By seeking to invoke powers of trial court to compel reconveyance by apartment owner of one-half interest in condominium apartment to owner's brother, on basis that conveyance was contrary to rules of declaration of condominium, condominium association invoked sovereign power of state to legitimize restrictive covenants in question, thus enabling District Court of Appeal to pass upon question whether covenant was violative of Fourteenth Amendment to the United States Constitution. U.S.C.A.Const. Amend. 14.

10. Constitutional Law ⇐82(9), 83(1)
Covenants ⇐1

Restrictive covenant forbidding occupancy of condominium premises by families with young children amounts to substantial interference with choice to beget and bear children; other constitutionally protected interests which may also be infringed to varying degrees by such restrictive covenant include interest which supports free and open travel among the states, interest which parents have in being able to supervise their children's education and enjoy their companionship, and interest concerning family living arrangements. U.S.C.A. Const. Amend. 14.

11. Constitutional Law ⇐82(10)

In our society the family unit is swathed in protection of the Constitution, and any substantial interference directly affecting family must be supported by countervailing and superior interest. U.S. C.A.Const. Amend. 14.

12. Constitutional Law ⇐83(1)

Constitutional rights, even those characterized as fundamental, are not absolute; occasionally, exercise of protected right must give way when public interest is sufficiently compelling to justify infringement of personal liberties.

James G. Kincaid, Fort Lauderdale, for appellants.

Michael K. Davis of Watson, Hubert & Davis, Fort Lauderdale, for appellee.

KOVACHEVICH, ELIZABETH A., Associate Judge.

Appellants-defendants appeal a final judgment entered in favor of the appellee-plaintiff-condominium which set aside the transfer by deed of a certain ownership interest from one defendant-brother to the other defendant-brother on the basis that the same was contrary to the rules of the declaration of condominium which prohibited ownership by more than one family, and ordered the reconveyance by defendant, Norman Franklin of all of his interest in an

apartment back to defendant Marvin Franklin. Of the six points raised on appeal, four have merit, and on the same, we reverse.

Defendants are out-of-state residents who desired to purchase a condominium apartment; their plans were contingent upon owning it jointly. Defendants decided to purchase a certain unit which was then owned by a Mr. and Mrs. Murray, who had listed the property for sale with a real estate broker, who represented those sellers. A salesman for that broker brought the ultimate purchaser, defendant Marvin Franklin, together with the owners in negotiations which culminated in the signing of a contract for the purchase of said apartment in the name of "Marvin Franklin or nominee".

Defendants testified that they wanted this apartment as a joint venture so that their respective families would have a place to stay when they visited Florida; they maintained that this was the sole motivation for their purchase in the first instance. Both defendants applied for approval of ownership and submitted membership applications to the plaintiff. There is a conflict in the testimony as to whether or not the plaintiff failed to give written notice of rejection of either of the applications to the unit owner, defendants contend that under Article XXII of the Declaration of Condominium, failure to give such written notice within ten (10) days was tantamount to consenting to the defendants' applications. At the closing, defendants' attorney was informed that defendant Norman Franklin's application could not be found. Sale of the apartment was made to defendant Marvin Franklin, whose application had been approved, and who then conveyed half his interest to defendant Norman Franklin.

Plaintiff asserted that defendant Norman Franklin's application had never been accepted because he had a child under age twelve in violation of condominium rules. Despite said rules, defendant Norman Franklin had been informed by the real estate agent for the Murrays that it was permissible for non-Florida residents to have guests under the age of twelve (12) live there, and, defendants were aware of two other non-Florida residents in the condominium with children under twelve (12) years of age. Ten (10) months after the closing, plaintiff brought suit seeking a declaratory judgment that the transfer from defendant Marvin Franklin to himself and his brother vesting an undivided one-half (1/2) interest in said apartment in each of them was void. The lower court denied defendants' request for a jury trial and subsequently entered a final judgment, as indicated hereinabove.

[1] This point on appeal questions the holding of title jointly by defendants. Ownership by the two defendant blood brothers was permissible; Article X specifically allows joint ownership of condominium apartments: "Membership may be held in the name of more than one owner ..." In the entire Article there is no mention of any limits upon the amount of owners or the character of the group that might own the apartment; the word "family" is not even mentioned in the provision. It speaks not to the manner of use but specifically to the number of owners. The court should not now aid the plaintiff in reading a new and unstated restriction into the unqualified language of its own condominium document.

The next point questions what a "single family" is. Defendants contend that they were members of a single family and the use to which they put the condominium apartment was that of a single family residence. Article XXIII prohibits use for any other purpose than as a "single family residence." The word "family" has been used to describe a number of different sets of relationships and there is no consensus as to exactly what a family is. A zoning ordinance in *Carroll v. City of Miami Beach*, 198 So.2d 643 (Fla. 3rd DCA 1967), defined a family as "one or more persons occupying premises and living as a single housekeeping unit". The most recent federal expression on the same was an opinion filed on May 31, 1977, by the Supreme Court of the United States in *Moore v. City of East*

Cleveland, Ohio, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531, wherein a municipal housing ordinance sought to limit occupancy of a dwelling unit to members of a single family, but defined "family" in such a way that the appellant's household did not qualify. In reversing, the majority concluded that the ordinance there deprived the appellant of her liberty in violation of the due process clause of the Fourteenth Amendment; it expressly selected certain categories of relatives who may live together and declared that others may not. The court indicated that the strong constitutional protection of the sanctity of the family established in numerous decisions of the Supreme Court extends to the family choice involved in that case and is not bound within an arbitrary boundary drawn at the limits of the nuclear family, which essentially is a couple and its dependent children. In conclusion, the court said that the history and tradition of this nation compel a larger conception of the family: " the Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns." In his concurring opinion, Mr. Justice Stevens finds that the right involved is the right to use one's own property as one sees fit.

[2-4] The confusion surrounding the definition of the term "family" must be taken into account when interpreting the restrictions in the instant case, sub judice. As a restriction on the free use of property the single family rule must be "strictly construed in favor of free and unrestricted use of real property". *Moore v. Stevens*, 90 Fla. 879, 106 So. 901 (1925). "Substantial ambiguity or doubt must be resolved against the person claiming the right to enforce the covenant." *Moore, supra*, at 904. A restrictive covenant must be read in the context of the entire document in which it is contained. *Moore, supra*. When the "single family residence" restriction is read in conjunction with the context of the joint ownership provision, the two sections are inconsistent, and inherently ambiguous. Even if one were to consider that the defendants constitute two separate families, the use to which they put the apartment was that of a single family dwelling; according to the record herein, each of the defendants alternated their stays on the premises.

[5] Two other points involve the subject of approval, but regarding different conveyances. Article XXII deals with written notice of disapproval to the Murrays, who were then owners of the apartment, and did not require notice to the defendants. The Murrays did not convey to both defendant brothers; they conveyed to defendant Marvin Franklin. From the record on appeal, the Murrays are not parties to this law suit and have made no complaint concerning this procedural matter. Further, the conveyance in dispute, sub judice, is not the conveyance from the Murrays, but rather, is the conveyance from the defendant Marvin Franklin to his brother. Thus, the question is whether or not, under the facts of this case, the conveyance of an undivided one-half interest in the apartment from defendant Marvin Franklin to defendant Norman Franklin required any approval. Article XXII specifically allows transfer of an apartment to a member of the "immediate family"; no approval is needed for such a transfer. Plaintiff concedes that where other requirements and restrictions were satisfied, an owner does not need the approval by the condominium association to convey an outright fee simple interest in the apartment to his brother. Defendant Norman Franklin is a member of the immediate family of Marvin Franklin. Thus, the transfer of part of the interest in the apartment from Marvin Franklin to Marvin Franklin and Norman Franklin was valid.

The final point on appeal that we find has merit relates to a restriction in condominium documents against children under the age of twelve (12) as an unconstitutional restriction and violation of defendant Norman Franklin's rights to marriage, procreation, and association, and violation of his right to equal protection of the laws.

[6] Article XXIII prohibits children under the age of twelve (12) from residing on

the condominium premises. This was the reason given by plaintiff for its disapproval of Norman Franklin's membership application. The instant case involves a number of rights which the Supreme Court of the United States has labeled "fundamental": the right to marry, *Loving v. Commonwealth of Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1966), and the right to procreate, *Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942), and the right to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). This restriction is an unconstitutional violation of this defendant's rights to marry and procreate. Further, no compelling reason has been shown for refusing to allow children under twelve (12) to reside in the condominium. It seems difficult to comprehend that change that occurs on a child's twelfth birthday which suddenly renders him fit to live in the condominium, and the plaintiff has offered no explanation regarding the same. Additionally, the plaintiff provides for a designation of children guests and has certain families with children under twelve (12) residing on the premises. Thus, the enforcement of the restriction is not only unsupportable by a compelling interest but is obviously unreasonable, since the plaintiff seeks to selectively and arbitrarily enforce the restriction. Even if the rule were valid, such unequal enforcement would be a violation of equal protection. *East Coast Lumber Terminal v. Town of Babylon*, 174 F.2d 106 (2d Cir. 1949).

We find that the trial court erroneously ordered defendant Norman Franklin to transfer his interest in the apartment to defendant Marvin Franklin, and reverse the lower court and remand for the entry of a final judgment in favor of defendants, Marvin Franklin and Norman Franklin.

[7] However, on the other point raised on appeal, we affirm the trial court. The lower court did not err in refusing to grant the defendants' motion for a jury trial. In this cause, the question for determination involved title to real property. No claim or counterclaim was made for damages or any other common law issue. Considering the equitable nature of the complaint, any jury trial, if affordable at all, is clearly subject to the discretion of the trial court, and no abuse of discretion is shown. See *Commodore Plaza at Century Twenty One Condominium Association, Inc. v. Century Twenty One Commodore Plaza, Inc.*, 290 So.2d 539 (Fla. 3rd DCA 1964); *Davis v. McGahee*, 257 So.2d 62 (Fla. 1st DCA 1972).

Accordingly, we affirm, in part, and reverse, in part, and remand, with directions consistent with the views expressed herein.

AFFIRMED, in part; REVERSED, in part, and REMANDED, with directions.

MAGER and CROSS, JJ., concur.

ON PETITION FOR REHEARING

CROSS, Judge.

By petition for rehearing, appellee, White Egret Condominium, Inc., asks reconsideration of our determination that a restrictive covenant contained in condominium documents forbidding residency by families with children under twelve years of age is unconstitutional and therefore is unenforceable in the courts of this state.

[8, 9] Appellee correctly points out that the constitutional protection envisaged by the Fourteenth Amendment to the Constitution of the United States has been consistently held to inhibit only state action and offers no recourse against merely private conduct, no matter how discriminatory or repugnant to public notions of wrongfulness.[1] So long as the objectives of these types of agreements are effectuated by voluntary adherence to their terms, it is clear that no action by the state would be involved, and therefore no constitutionally protected rights can be said to have been violated.

State action is, however, a broad concept and the actions of state courts and of judi-

1. *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). See also *United States v. Harris*, 106 U.S. 629, 1 S.Ct. 601, 27 L.Ed. 290 (1883).

cial officers performing in their official capacities have long been regarded as state action.[2] When the appellee as plaintiff below sought to invoke the powers of the trial court to compel a reconveyance of the interest of Norman Franklin in the condominium apartment to his brother, it invoked the sovereign powers of the state to legitimize the restrictive covenant at issue. This court therefore owed a duty to carefully scrutinize that covenant with a view toward forbidding its enforcement should it fail to pass constitutional muster.

In our original opinion rendered in this matter[3] we chose to concern ourselves with an examination of the constitutional rights of appellants as parents rather than to focus on the rights of appellants' children to be free of discrimination due to their age. The question presented was whether the recognized constitutional right of privacy[4] protects a family from losing its interest in property solely because children under the age of twelve reside with their parents. In view of the unique position of homage which the family unit enjoys in our society[5] and with regard to the panoply of rights associated with family life,[6] we determined that the right of privacy grants to the family protection from unreasonable restrictions on the use of a residence.

We express particular concern for the intrusion which a restrictive covenant such as that at issue has on the decision to beget and bear children. The right to be free of unwarranted interference with the decision to have children has been identified on numerous occasions by the United States Supreme Court as one of the matters protected by the right of privacy.[7] Recent decisions[8] by that court make it clear that the Constitution will not permit any undue burden being placed on the decision to bear a child. There can be little doubt that the restrictive covenant forbidding occupancy of condominium premises by families with young children amounts to a substantial interference with the choice to beget and bear children. The fear of being compelled by the courts of this state through the operation of this covenant to sell or relocate a family domicile merely because a couple may choose to have children is a burden which neither the Constitution nor this court will condone.

[10, 11] We pause to note that other fundamental interests which fall within the penumbra of constitutional protection may also be infringed to varying degrees by the restrictive covenant under consideration: the interest which supports free and open travel among the states;[9] the interest which parents have in being able to supervise their children's education[10] and enjoy

2. *Shelley v. Kreamer*, id.

3. *Franklin v. White Egret Condominium, Inc.*, 358 So.2d 1084 (Fla. 4th DCA Opinion issued August 9, 1977).

4. See, e. g., *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Griswold v. State of Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

5. See *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (slip opinion issued April 26, 1977); *Moore v. City of East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977).

6. See *Moore v. City of East Cleveland*, id.; *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923).

7. E. g., *Griswold v. State of Connecticut*, supra n.4; *Roe v. Wade*, supra n.4.

8. *Carey v. Population Services International*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972).

9. *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); *United States v. Guest*, 383 U.S. 745, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966).

10. *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Prince v. Commonwealth of Massachusetts*, supra n.6; *Pierce v. Society of Sisters*, supra n.6; see also *Meyer v. Nebraska*, supra n.6.

their companionship;[11] the interest concerning family living arrangements.[12] In our society the family unit is swathed in the protection of the Constitution, and any substantial interference directly affecting the family must be supported by a countervailing and superior interest.[13]

Appellee-condominium association offers as its only justification in support of this restriction on residency of apartments by families with children under twelve years of age the fact that young children "are noisy, distracting and frequently an imposition upon our neighbors." Although peace and quiet in living accommodations is an admirable objective, we do not believe that this interest is sufficiently important to justify divestiture of one's interest in property.

Appellee argues that all buyers of condominium apartments have voluntarily consented to the imposition of these limitations upon their rights. We emphasize that we have here a willing seller and a willing buyer, and a contract of sale which was properly consummated. It is clear that but for the intervention of the courts, appellants would be free to occupy the property in question without restraint.

Appellee asks us to review the cases of *Riley v. Stoves*, 22 Ariz.App. 223, 526 P.2d 747 (1974), and *Coquina Club, Inc. v. Mantz*, 342 So.2d 112 (Fla. 2d DCA 1977). In *Riley*, the Court of Appeals of Arizona upheld against constitutional attack a restriction which limited residency of a portion of a mobile home development to persons twenty-one years of age or older. To the extent that the Arizona Court of Appeals determined that restricting residency by children to reduce distractions and disturbances is reasonable in light of the significant interference with the traditional family, we must disagree. To the extent that peace and quiet in a neighborhood is a legitimate objective, restricting occupancy by families with children imposes a burden on the exercise of constitutionally protected rights which is entirely disproportionate to the slight benefit received.

In *Coquina Club*, the Court of Appeal for the Second District of Florida discussed the existence of condominium use restrictions based on age. However, the court admitted that the validity of use and occupancy restrictions was only a "subsidiary question" and was not "dispositive of the primary issue." The court acknowledged that age restrictions in at least one other jurisdiction "have even withstood constitutional attacks," and cited the *Riley* case discussed above. The court also noted that "reasonable" restrictions concerning the use and occupancy are permitted by statute. However, the decision in *Riley* did not address itself to whether such restrictions were reasonable as we have done here today, and therefore it is clear that *Coquina Club* is not in conflict with the views expressed herein.

Finally, appellee re-asserts that the transfer of ownership to Norman Franklin must be voided because it is in violation of a second restrictive covenant which limits use of condominium apartments to "single family" occupancy. In response, we again refer appellee to the decision of the United States Supreme Court in *Moore v. City of East Cleveland*, supra n.5, for a constitutionally accepted definition of "single family."

[12] We are cognizant of the great interest which our former opinion in this action has created. We are also aware that restrictive covenants, such as those at issue today, are commonplace among condominium associations in Florida. We believe that the conflicting interests between those who would live with children and those who desire to live apart from families with children are amenable to resolution. Constitutional rights, even those characterized as fundamental, are not absolute. Occasionally, the exercise of a protected right must

11. *Stanley v. Illinois*, supra n.6; *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949) (Frankfurter, J., concurring).

12. *Moore v. City of East Cleveland*, supra n.5.

13. *Moore v. City of East Cleveland*, id.; *Roe v. Wade*, supra n.4; *Taxpayers' Association of Weymouth Township, Inc. v. Weymouth Township*, 71 N.J. 249, 364 A.2d 1016 (1976).

give way when the public interest is sufficiently compelling to justify the infringement of personal liberties. Several courts have already recognized that senior members of our society possess significant interests which are deserving of special consideration.[14] The proper balancing of the competing interests highlighted in this case cannot, however, be achieved through court enforcement of the restrictive covenants.

Accordingly, the petition for rehearing is denied.

KOVACHEVICH, ELIZABETH A., Associate Judge, concurs.

LETTS, J., dissents, with opinion.

LETTS, Judge,[1] dissenting:

I would grant the rehearing.

The majority decision establishes a unique and unfortunate precedent in holding that the Equal Protection Clause of the Fourteenth Amendment applies to age restrictions in an environment created for senior adults.

There are countless examples of apparently valid and enforced age restrictions which run the gamut from the required 3 years of age for Kentucky Derby entrants, all the way to the necessary 35 years that any aspirant to the Presidency must have attained under the Constitution itself. Art. II, § 1, U.S.Const. Judge Kovachevich finds it difficult to comprehend the "... change that occurs on a child's twelfth birthday which suddenly renders him fit to live in a condominium." Maybe so, but from whence the magic of a 35th birthday which suddenly renders a person fit to live in the White House, even though one can serve as a U.S. Senator for 5 years before that? (and why 30 years of age for the Senate?) The answer is that, "between night and day, childhood and maturity, or any other extremes ... a line has to be drawn [somewhere]", *Riley v. Stoves*, 22 Ariz.App. 223, 526 P.2d 747, 68 A.L.R.3d 1229 (1974).

The Federal Courts have held repeatedly that age by itself is not a suspect classification even where actual State action results in the mandatory retirement of policemen at age 50 [see *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed. 520 (1976)]. This being so, it has to follow that an age restriction emanating from private contract would be even less suspect provided it has a rational basis. True, it can be argued that enforcement of an age restriction by the courts, constitutes State action, however, I agree with the Arizona Court of Appeals that such an argument is "unrealistic" here. *Riley v. Stoves*, supra. In other words, is the line that has been drawn, reasonable?

Adapting this rational basis test to age discrimination, I do not find a restriction barring the RESIDENCY of children under 12 to be unreasonable, for example, in an elderly retirement community or condominium. Nature itself biologically provides that only younger adults can procreate. It is axiomatic that catabolism in the old results in physical and mental frailties which render them not only incapable of reproduction, but also incompetent to withstand the rough, tumble and noise of rampaging youngsters—inevitable accompaniments to the normal rearing of young children. For this very reason, kids are commonly barred from hospitals. Sick people need peace and quiet and so do old people who lose their erstwhile resilience to turmoil and commotion. Indeed, tranquility is a must for the mental health of older people and I would allow them to have it. So would the only other two Florida decisions that have so far touched on the question. This very court in

14. See *Shepard v. Woodland Tp. Com. & Plan. Bd.*, 71 N.J. 230, 364 A.2d 1005 (1976); *Maldini v. Ambro*, 36 N.Y.2d 481, 369 N.Y.S. 385, 330 N.E.2d 403 (1975); *Taxpayers' Association of Weymouth Township, Inc. v. Weymouth Township*, supra n 13. But see *Molino v. Mayor and Council of Bor. of Glassboro*, 116 N.J.Super. 195, 281 A.2d 401 (1971).

1. By the time the petition for rehearing was filed subsequent to the issuance of the original opinion, Judge Mager had resigned from the bench to resume the practice of law. Judge Letts took his place on the panel for the purpose of said petition.

Hidden Harbour Estates, Inc. v. Norman, 309 So.2d 180 (Fla. 4th DCA 1975) said, in an opinion written by Judge Downey:

> "It appears to us that inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization. The Declaration of Condominium involved herein is replete with examples of the curtailment of individual rights usually associated with the private ownership of property. It provides, for example, that no sale may be effectuated without approval, NO MINORS MAY BE PERMANENT RESIDENTS; no pets are allowed." (emphasis, supplied) at page 181.

Likewise the Second District has suggested that age restrictions are not unreasonable and perhaps even enforceable by Statute under Section 718.104(5), Fla.Stat. (1977).[2] *Coquina Club, Inc. v. Mantz*, 342 So.2d 112 (Fla. 2d DCA 1977).

The majority opinion believes that age restrictions run afoul of fundamental rights such as marriage and procreation. These are "motherhood and the flag" proclamations and the cases cited in support simply do not relate these unassailable fundamentals to an age restriction. Certainly this particular age restriction does not deny the right of any adult owner to take a bride and continue to live in his condominium apartment. Nor does it deny him the right to procreate; he simply has to move when the child is born. This is comparable, in principle, to a couple with three kids having to move to a bigger house upon the arrival of the fourth, because the existing living quarters are bursting at the seams and the zoning will not permit the addition of another room.

There is a case noted by Judge Cross, which *did* hold that a zoning ordinance, which had the effect of keeping children out of the municipality, violated the Equal Protection Clause. See *Molino v. Mayor and Council of Bor. of Glassboro*, 116 N.J. Super. 195, 281 A.2d 401 (1971). However, the facts of that case reveal an acute shortage of any living units in the area where children could be housed. No such shortage is demonstrated in the case at bar. Moreover, the *Molino* case did involve state action and all can agree that zoning is ever subject to change in the interests of the general public good. This is a far cry from a private restriction in a declaration of condominium.

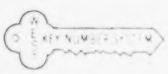
The foregoing paragraphs say little about Judge Cross' contribution in defense of the original opinion which defense is much harder to argue with because it covers the constitutional waterfront with blue chip citations. To me, his most telling sentence is where he expresses "the fear of being compelled by the courts of this State through the operation of this covenant to sell or relocate a family domicile merely because a couple may choose to have children ..." In reply, I would say first, that under the facts of this case, the couple had already had the children BEFORE the purchase, so the argument is not pertinent to the case at bar. There remains, however, the on-going problem of a young couple who have no children when they purchase a condominium, but a child later appears. Such a situation requires a much stricter scrutiny, and I am troubled by it. Nonetheless, I believe that this age restriction still passes the test and I fall back on Judge Downey's language relative to condominium living, already quoted from the *Hidden Harbour Estates* case, supra. All young couples buying

2. Said section of the statute reads in part as follows:

> The declaration may include covenants and restrictions concerning the use, occupancy and transfer of the units permitted by law with reference to real property.

living units can foresee the possibility of children and this restriction has not "snuck" up on them, for they well knew of it prior to purchase or conception. The choice was theirs.

In conclusion, I am also not in agreement with much of the reasoning behind the disposition of the other points on appeal, although estoppel could be a factor in this particular case. However, my dissent is already too wordy and I only agonize this long in the hopes that I facilitate higher appellate review of the majority's Equal Protection argument.



Rene DE LA PAZ, Appellant,

v.

The STATE of Florida, Appellee.

No. 77-1416.

District Court of Appeal of Florida, Third District.

Feb. 28, 1978.

Appeal was taken from order of the Circuit Court for Dade County, Richard S. Fuller, J., revoking probation and imposing sentence. The District Court of Appeal held that since trial court without jurisdiction to mitigate legal sentences imposed, by reducing sentences to time already served plus added term of probation, order placing defendant on probation was a nullity and sentence imposed for violation of probation was illegal.

Reversed and remanded with directions.

1. Criminal Law ⇐996(1)

Trial court had jurisdiction to correct illegal sentence but was without jurisdiction to mitigate legal sentences imposed. 34 West's F.S.A. Rules of Criminal Procedure, rule 3.800(a).

2. Criminal Law ⇐982.3(2)

Since trial court was without jurisdiction to mitigate legal sentences imposed, by reducing sentences to time already served plus added term of probation, order placing defendant on probation was a nullity and sentence imposed for violation of probation was illegal.

Weiner, Robbins & Tunkey, Miami, for appellant.

Robert L. Shevin, Atty. Gen., Joel D. Rosenblatt, Jose R. Rodriguez and Steven R. Jacob, Asst. Attys. Gen., for appellee.

Before PEARSON, NATHAN and KEHOE, JJ.

PER CURIAM.

The defendant appeals an order revoking probation and a sentence of two concurrent terms of five years. The State accepts appellant's statement of facts, which reveals the following: The defendant was sentenced on April 20, 1971, to four one year sentences in the Dade County jail to be served concurrently with another one year sentence, and a one year sentence, also in the Dade County jail, to be served at the expiration of the concurrent one year sentences.[1] On September 24, 1971, the court held a hearing on defendant's motion to mitigate the sentences. At this time, the court also corrected the sentences in light of the holding in *State v. Evans*, 225 So.2d 548 (Fla. 3d DCA 1969). The court set aside the sentence that was to be served consecutively so that it would be served concurrently with the other sentences. Finally, the court mitigated the four concurrent sentences to a sentence of the time already

1. Therefore, in summation, defendant was to serve a one year sentence (sentence one) to run concurrently with four other one year sentences (sentences two, three, four and five) and then to serve a consecutive one year sentence (sentence six), all in the Dade County jail.

WHITE EGRET CONDOMINIUM, INC., Appellant, Petitioner,

v.

Marvin FRANKLIN et al., Appellees, Respondents.

No. 54519.

Supreme Court of Florida.

Dec. 13, 1979.

Rehearing Denied Feb. 19, 1980.

Sale of condominium apartment was made to one purchaser whose application had been approved by condominium association, and he conveyed half his interest in apartment to his brother. Association sought to have transfer set aside on theories that such brother had minor children in violation of restriction not allowing any children under 12 years of age to reside on premises and that permitting two brothers and their families to occupy premises would violate restriction against use of apartment for purpose other than "single family residence." The Circuit Court, Broward County, Gene Fischer, J., entered final judgment setting aside transfer and brothers appealed. The District Court of Appeal, Kovachevich, Elizabeth A., Associate Judge, 358 So.2d 1084, reversed. On direct appeal and on petition for writ of certiorari, the Supreme Court, Overton, J., held that: (1) age restrictions are reasonable means to identify and categorize varying desires of the population in regard to housing, but cannot be used to unreasonably or arbitrarily restrict certain classes of individuals from obtaining desirable housing; (2) restriction against residency by children under age of 12 was reasonably related to lawful objective, and, thus, did not per se violate right to equal protection; (3) enforcement of such restriction against brother was an unconstitutional arbitrary and unequal enforcement of the restriction; (4) condominium agreement's provisions prohibiting use of apartment for any purpose other than as a single-family residence but permitting ownership by more than one individual, were inconsistent and inherently ambiguous, and, thus, the doubt had to be resolved against party claiming right to enforce the covenant; and (5) even if two brothers and their families constituted two separate families, their use of apartment was a "single family use."

Ordered accordingly.

1. Condominium ⇨13

Condominium restriction or limitation does not inherently violate fundamental right and may be enforced if it serves a legitimate purpose and is reasonably applied. U.S.C.A.Const. Amend. 14; West's F.S.A. § 718.112(3).

2. Covenants ⇨1

In regard to housing, age restrictions are a reasonable means to identify and categorize varying desires of the population but cannot be used to unreasonably or arbitrarily restrain certain classes of individuals from obtaining desirable housing. U.S.C.A. Const. Amend. 14; West's F.S.A. § 718.112(3); National Housing Act, § 1 et seq., 12 U.S.C.A. § 1701 et seq.; Housing Act of 1959, § 202(d)(4), 12 U.S.C.A. § 1701q(d)(4); Housing Act of 1949, § 515(a)(3), 42 U.S.C.A. § 1485(a)(3); Older Americans Act of 1965, § 101 et seq., 42 U.S.C.A. § 3001 et seq.

3. Constitutional Law ⇨253.2(3)

Restriction on individual rights on basis of age need not pass "strict scrutiny" test; age is not a suspect classification. U.S.C.A. Const. Amend. 14.

4. Constitutional Law ⇨213.1(1), 253.2(3)

Test for determining whether an age restriction denies due process or equal protection is whether the restriction under particular circumstances of the case is reasonable and whether it is discriminatory, arbitrary or oppressive in its application. U.S.C.A.Const. Amend. 14; West's F.S.A. § 718.112(3); National Housing Act, § 1 et seq., 12 U.S.C.A. § 1701 et seq.; Housing Act of 1959, § 202(d)(4), 12 U.S.C.A. § 1701q(d)(4); Housing Act of 1949, § 515(a)(3), 42 U.S.C.A. § 1485(a)(3); Older

Americans Act of 1965, § 101 et seq., 42 U.S.C.A. § 3001 et seq.

5. Constitutional Law ⇐82(10)

It is not mandated that all related relatives be allowed to live in whatever single-family facilities they desire. U.S.C.A. Const. Amend. 14; West's F.S.A. § 718.-112(3); National Housing Act, § 1 et seq., 12 U.S.C.A. § 1701 et seq.; Housing Act of 1959, § 202(d)(4), 12 U.S.C.A. § 1701q(d)(4); Housing Act of 1949, § 515(a)(3), 42 U.S. C.A. § 1485(a)(3); Older Americans Act of 1965, § 101 et seq., 42 U.S.C.A. § 3001 et seq.

6. Constitutional Law ⇐225.5

Condominium agreement's restriction against residency of children under age of 12 was reasonably related to lawful objective, and, thus, did not per se violate right to equal protection. U.S.C.A.Const. Amend. 14; West's F.S.A. § 718.112(3); National Housing Act, § 1 et seq., 12 U.S.C.A. § 1701 et seq.; Housing Act of 1959, § 202(d)(4), 12 U.S.C.A. § 1701q(d)(4); Housing Act of 1949, § 515(a)(3), 42 U.S. C.A. § 1485(a)(3); Older Americans Act of 1965, § 101 et seq., 42 U.S.C.A. § 3001 et seq.

7. Condominium ⇐13

Enforcement of condominium agreement's restriction, which prohibited residency by children under age of 12, against person, to whom one-half interest in condominium was conveyed and who had children under 12 years of age, was an unconstitutional arbitrary and unequal enforcement of the restriction where six other children under the age of 12, including some substantially under such age, were living in two households within the condominium complex. U.S.C.A.Const. Amend. 14.

8. Condominium ⇐13

Condominium agreement provisions, which prohibited use of condominium apartment for any purpose other than as a single-family residence and did not define the term "single family residence" and which permitted ownership of an apartment by more than one individual, were inconsistent and ambiguous, and, thus, the doubt had to be resolved against party claiming right to enforce the covenant against use other than as a single-family residence.

9. Condominium ⇐13

Even if two brothers and their families constituted two separate families, their use of condominium apartment was a "single family use" within meaning of condominium agreement prohibiting use of apartment for any purpose other than as a single-family residence where only one brother and his family actually occupied apartment at any given time.

See publication Words and Phrases for other judicial constructions and definitions.

Welcom H. Watson, Jr., and Michael K. Davis of Watson, Hubert & Davis, Fort Lauderdale, for appellant, petitioner.

James G. Kincaid, Fort Lauderdale, for appellees, respondents.

Gerald W. Pierce of Henderson, Franklin, Starnes & Holt, Fort Myers, for Leisure Technology of Florida, Inc., amicus curiae.

Ralph H. Haben, Jr., Palmetto, for Florida Apartment Ass'n, amicus curiae.

Mark B. Schorr of Becker, Poliakoff & Streitfeld, Fort Lauderdale, for amicus curiae.

OVERTON, Justice.

This case is before this Court on direct appeal and on petition for writ of certiorari from the decision of the Fourth District Court of Appeal reported at 358 So.2d 1084 (Fla. 4th DCA 1978). The district court construed provisions of the United States Constitution in determining the constitutionality of an express covenant in a condominium agreement which prohibited children under the age of twelve from residing in the condominium premises. In addition, the decision of the district court fails to harmonize with portions of *Coquina Club, Inc. v. Mantz*, 342 So.2d 112 (Fla. 2d DCA 1977), and *Hidden Harbor Estates, Inc. v.*

Norman, 309 So.2d 180 (Fla. 4th DCA 1975). We have jurisdiction.[1]

The principal issue is whether a condominium agreement containing a restriction against residency by children under the age of twelve violates a condominium purchaser's constitutional rights to marriage, procreation, and association, and his right to equal protection of the laws. We find such a restriction is not constitutionally prohibited unless unreasonably or arbitrarily applied. We disagree with the district court's holding that the restriction was unreasonable "per se" and unconstitutional. We do agree, however, that the condominium restriction in the instant case was arbitrarily and selectively applied, and therefore we approve the result.

The recency of the condominium concept, its dependency upon certain use and occupancy restrictions and rules, and the substantial development of retirement communities in this state necessitate a full discussion of this issue.

Two brothers, Marvin Franklin and Norman Franklin, sought to acquire a condominium apartment as a joint vacation home for their respective families when they visited Florida. Although they intended to have dual ownership of this condominium, only one brother's family at a time would be using the apartment. Both brothers filed application for ownership, but only Marvin's application had been approved at the time of the closing. The record reflects that at the closing Norman Franklin's application could not be found. The apartment was conveyed to Marvin Franklin who then transferred one-half ownership to Norman. Ten months after the conveyance, White Egret Condominium, Inc., the condominium association, sought to set aside the transfer of the ownership interest from Marvin to Norman on the grounds that: (1) the defendant, Norman Franklin, had minor children in violation of the restriction which did not allow any children under twelve years of age to reside on the premises, and (2) permitting two brothers and their respective families to occupy and own the premises violated the restriction which did not permit the use of the apartment for any purpose other than as a "single family residence."

The condominium agreement did not define the phrase "single family residence." The agreement did provide that membership could be held in more than one owner's name and that an apartment could be transferred to a member of the "immediate family." In addition, the condominium association conceded that where other requirements and restrictions were satisfied, the owner did not need the association's approval to convey a fee simple interest in the apartment to a brother. The record further reveals that six children under the age of twelve were residents of White Egret Condominium.

In entering its final judgment, the trial court directed Norman to reconvey title of his one-half ownership interest to his brother, Marvin, because said conveyance from one brother to another brother was "void and contrary to the declaration of condominium and other documents related thereto which limit ownership in condominium apartments in White Egret Condominium to a single family." This was the sole ground for the trial court's judgment. The final judgment was not based on the fact that Norman had minor children under the age of twelve, contrary to the condominium declaration.

The district court reversed the trial court's judgment, holding: (1) that the restriction against children under the age of twelve was an unconstitutional violation of the rights to marriage, procreation, and association, and of the right to equal protection of the laws; (2) that the restriction was unreasonable because the condominium association selectively and arbitrarily enforced its application; and (3) that the restriction against the use of the apartment for purposes other than as a single family residence was not violated because the two brothers and their families alternated their stays in the apartment.

1. Art. V, § 3(b)(1), (3), Fla.Const.

Constitutionality of Age Restrictions or Limitations

In holding that the restriction violated an owner's constitutional rights, the district court primarily relied upon three United States Supreme Court decisions: (1) *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (holding unconstitutional a statute prohibiting a white person from marrying anyone but a white person); (2) *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (holding unconstitutional a statute prohibiting use and distribution of contraceptives); and (3) *Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) (holding unconstitutional a statute requiring sterilization of habitual criminals). In our view, the district court's reliance on these cases was misplaced and not a proper interpretation of them.

The limitation on use of property by requiring single dwelling units and single family use has received constitutional support. In *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974), the United States Supreme Court considered the constitutionality of a zoning ordinance which restricted land use to one family dwellings. Family was defined to mean any number of persons related by blood, adoption, or marriage, or not more than two unrelated persons living as a single housekeeping unit. The majority opinion held that this restriction violated no fundamental right, such as the right of association or privacy. The court found the restriction reasonable and rationally related to a permissible state objective, and therefore held it did not violate equal protection. Referring to this ordinance having an appropriate purpose, the court stated:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v. Parker*, [348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27] *supra*. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Id. at 9, 94 S.Ct. at 1541.

On the other hand, there have been cases holding that property and family limitations in zoning ordinances violate constitutional rights. In *Moore v. City of East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977), Mrs. Moore lived in her home with her son and two grandsons who were cousins rather than brothers. A housing ordinance selected categories of relatives who may live together and others who may not, making failure to comply a criminal penalty. Mrs. Moore received a notice of violation from the city stating that one grandson was "an illegal occupant" and directing her to comply with the ordinance. When she failed to remove her grandson from her home, the city filed a criminal charge. A motion to dismiss was denied, and Mrs. Moore was convicted and sentenced to five days in jail and a $25 fine. The United States Supreme Court held that the ordinance could not be justified as serving the city's interests of preventing overcrowding and minimizing traffic and parking congestion. The court further held that the substantive due process right to live together as a family was not confined to the nuclear family, since the constitution's protection of the sanctity of the family was deeply rooted in the nation's history and tradition and since such tradition was not limited to respect for the bonds uniting the members of the nuclear family but extended as well to the sharing of their household with uncles, aunts, cousins, and especially grandparents. A concurring opinion by Justice Stevens, whose vote was necessary for a decision, stated: "The city has failed to totally explain the need for a rule which would allow a homeowner to have two grandchildren live with her if they are brothers, but not if they are cousins." In *Molino v. Mayor and Council of Glassboro*, 116 N.J.Super. 195, 281 A.2d 401 (1971), a zoning ordinance had the effect of keeping children out of the city for the admitted purpose of avoiding taxes and more schools.

The court held the ordinance violative of the equal protection clause. A review of the facts in both *Moore* and *Molino* clearly establishes an unreasonable and arbitrary application of the governmental police power.

In the instant case, the restriction is not a zoning ordinance adopted under the police power but rather a mutual agreement entered into by all condominium apartment owners of the complex. With this type of land use restriction, an individual can choose at the time of purchase whether to sign an agreement with these restrictions or limitations. Reasonable restrictions concerning use, occupancy, and transfer of condominium units are necessary for the operation and protection of the owners in the condominium concept.

[1] In *Hidden Harbor Estates, Inc. v. Norman*, 309 So.2d 180, 181-82 (Fla. 4th DCA 1975), Judge Downey explained the necessity for restrictions on condominium living:

> It appears to us that inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization.

In addition, the legislature of this state has expressly approved the allowance of reasonable restrictions on use and occupancy. *See* § 718.112(3), Fla.Stat. (1977). Therefore, it is our view that a condominium restriction or limitation does not inherently violate a fundamental right and may be enforced if it serves a legitimate purpose and is reasonably applied.

The issue of age restrictions in condominiums and housing developments is a new legal issue although it has recently been addressed by courts in other jurisdictions and referred to in two decisions of our district courts.[2] In *Hidden Harbor Estates, Inc. v. Norman*, the condominium association adopted a rule prohibiting the use of alcoholic beverages in certain areas of the common elements. A unit owner sought to enjoin the enforcement of the rule. The district court held that this was a reasonable rule, citing examples of other restrictions on individual rights which are necessary for the condominium concept: "[N]o sale may be effectuated without approval; no minors may be permanent residents; no pets are allowed." 309 So.2d at 182. The limitation on minors being permanent residents was quoted with apparent approval although it was not an issue in the cause. In *Coquina Club v. Mantz*, 342 So.2d 112 (Fla. 2d DCA 1977), the condominium board denied an application for the purchase of a unit by a family with two children under twelve years of age. Because of this denial, the unit owner sought to require the condominium to either purchase the unit or provide a purchaser for the apartment at his price. The district court noted that the condominium legislation in this state specifically allowed reasonable restrictions, and that age restrictions had withstood constitutional attack in other jurisdictions, citing *Riley v. Stoves*, 22 Ariz.App. 223, 526 P.2d 747 (1974). *See* Annot., 68 A.L.R.3d 1239 (1976).

In *Riley* the court upheld a covenant in a deed restricting occupancy in a mobile home subdivision to persons twenty-one years or older. The court stated: 'The obvious purpose is to create a quiet, peaceful neighborhood by eliminating noise associated with children at play or otherwise." *Id.* at 228, 526 P.2d at 752. The court noted there were other areas in the mobile home park for families with children. The court therefore found this restriction reasonably related to a legitimate purpose and declined to hold that its enforcement violated the defendant's right to equal protection.

2. *See generally* 7 Stetson Intramural L.Rev. 193 (Spring 1978)

In *Ritchey v. Villa Nueva Condominium Ass'n.*, 81 Cal.App.3d 688, 146 Cal.Rptr. 695 (Ct.App.1978), the issue before the court was the validity of a condominium bylaw restricting occupancy of condominium units to persons eighteen years of age or older. The court held that age restrictions in condominium documents were not unreasonable "per se," and that it was a reasonable restriction upon an owner's right to sell or lease his condominium unit.

We agree with these courts that age limitations or restrictions are reasonable means to accomplish the lawful purpose of providing appropriate facilities for the differing housing needs and desires of the various age groups. We reject the view that *Moore v. City of East Cleveland* absolutely prohibits this type of limitation. We note that Congress has established age limitations in recognizing the need for senior citizen housing by including an age minimum of sixty-two years for occupancy of certain housing developments. *See* 12 U.S.C. § 1701, *et seq.* (1969); 42 U.S.C. § 3001, *et seq.* (1973); 12 U.S.C. § 1701q(d)(4) (Supp.1979) (minimum age); and 42 U.S.C. § 1485(a)(3) (1978).

[2-5] The urbanization of this country requiring substantial portions of our population to live closer together coupled with the desire for varying types of family units and recreational activities have brought about new concepts in living accommodations. There are residential units designed specifically for young adults, for families with young children, and for senior citizens. The desires and demands of each category are different. Young adult units are predominantly one-bedroom units with extensive recreational facilities designed for the young, including tennis and racquet ball courts, weight rooms, saunas, and even disco rooms. The units designed principally for families are two- to four-bedroom units with recreational facilities geared for children, including playgrounds and small children's swimming pools. Senior citizen units are limited to one- and two-bedroom units designed to provide the quiet atmosphere that most of our senior citizens desire. These units may provide extra wide doors throughout the complex to allow sufficient clearance for wheelchairs and walkers and recreational facilities such as card rooms and shuffleboard courts. Although tennis courts and playgrounds may be desirable for younger tenants and owners, such facilities would be a waste of funds and be largely unused in a development which housed a substantial number of senior citizens. We cannot ignore the fact that some housing complexes are specifically designed for certain age groups. In our view, age restrictions are a reasonable means to identify and categorize the varying desires of our population. The law is now clear that a restriction on individual rights on the basis of age need not pass the "strict scrutiny" test, and therefore age is not a suspect classification. *See Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976). We do recognize, however, that these age restrictions cannot be used to unreasonably or arbitrarily restrict certain classes of individuals from obtaining desirable housing. Whenever an age restriction is attacked on due process or equal protection grounds, we find the test is: (1) whether the restriction under the particular circumstances of the case is reasonable, and (2) whether it is discriminatory, arbitrary, or oppressive in its application.

The totality of an age or family limitation in its application as it occurred in *Morino v. New Jersey* and *Moore v. City of East Cleveland* is clearly not present in the instant case. We further reject the view that *Moore* mandates that all related relatives must be allowed to live in whatever single family facilities they desire. Such an absolute rule would inversely prohibit those who desire to live in a facility without children from doing so.

[6] In the instant case the subject premises were admittedly to be used as a vacation retreat rather than as a family's primary residential home. Regardless of that fact, however, we find the restriction against children under the age of twelve reasonably related to a lawful objective, but under the circumstances of this case the

selective and arbitrary manner of enforcement is another issue.

Selective and Arbitrary Enforcement

[7] At the time Marvin Franklin purchased his condominium apartment, at least six other children under the age of twelve were living in this condominium complex. Further, the record reveals that the six children were in two separate households and that some of the children were substantially under the age of twelve. We agree with the district court's finding that this constituted unequal and arbitrary enforcement of the restriction. Although this restriction was reasonably related to a lawful objective, the appellant is estopped from selectively enforcing the age restriction. *See Fifty-Six Sixty Collins Avenue Condominium, Inc. v. Dawson*, 354 So.2d 432 (Fla. 3d DCA 1978), and *Plaza Del Prado Condominium Ass'n., Inc. v. Richman*, 345 So.2d 851 (Fla. 3d DCA 1977).

Single Family Use of the Condominium

[8, 9] The condominium agreement prohibited use of the condominium apartment for any purpose other than as a single family residence. The agreement, however, failed to define the term "single family residence" and expressly permitted ownership of an apartment by more than one individual. The district court found that when this undefined "single family residence" provision was read together with the joint ownership provision, the two sections were inconsistent and inherently ambiguous. As a result, the doubt must be resolved against the person claiming the right to enforce the covenant. *Moore v. Stevens*, 90 Fla. 879, 885, 106 So. 901, 904 (1925). The district court further noted that even assuming the two brothers and their respective families constitute two separate families, they used the apartment in a single family manner by alternating their visits to Florida. Only one brother and his family actually occupied the apartment at any given time, and this was in fact a single family use. We agree with these conclusions of the district court.

In addressing the issue of what constitutes a "single family," the district court cited *Moore v. City of East Cleveland* which held that the right to live together as a family may not be limited to only a few categories of related individuals by a housing ordinance with criminal penalties. For the reasons expressed previously in this opinion, we find *Moore* not applicable to the instant case.

Conclusion

We conclude that age limitations and restrictions may be enforced if reasonably related to a lawful objective and not applied in an arbitrary or discriminatory manner. In the instant case we find that the premises were in fact used as a single family residence and the age restriction was selectively and arbitrarily applied. Consequently, neither the age nor the single family restrictions may in this circumstance be judicially enforced, and we agree with the result reached by the district court.

It is so ordered.

ENGLAND, C. J., and ADKINS, BOYD and SUNDBERG, JJ., concur.

Ruth RAISEN, Petitioner,

v.

Philip RAISEN and Insurance Company of North America, Respondents.

No. 54838.

Supreme Court of Florida.

Dec. 20, 1979.

Rehearing Denied Feb. 21, 1980.

Wife sued husband and his insurer for damages arising out of husband's operation of automobile. The Circuit Court, Broward County, John G. Ferris, J., sustained motion

INSIDE THE MATURE MARKET

AMERICAN DEMOGRAPHICS

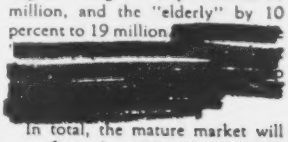
by William Lazer

Too many businesses think the older market is a poor market, missing opportunities to explore an almost untouched landscape of 51 million consumers. While some businesses may heed the 55 to 64 age group, they tend to ignore those aged 65 and older because of attitudes rooted in the conditions of the 1950s and 1960s rather than in the realities of today.

Older Americans in the 1980s are no more likely to be poor than are younger Americans. Though there are pockets of poverty among older people living alone, particularly older women and blacks, per capita discretionary income is highest for householders aged 55 and older.

The mature market is actually four different market segments. It begins at ages 55 to 64 with a group called the "older" population, whose children have grown up and who are taking a serious look at retirement. In 1985 there are an estimated 22 million of them with a pre-retirement lifestyle more like that of 45-year-olds than of those over 70.

The 65-to-74-year-olds, called the "elderly," number almost 17 million in 1985; those aged 75 to 84, called the "aged," total half that number, 9 million, while the "very old," aged 85 and over, total about 2.7 million. Over the next 10 years, the "very old" are projected to grow most rapidly, increasing by over 50 percent to 4 million in 1995. The "aged" will grow 25 percent to 11 million, and the "elderly" by 10 percent to 19 million.



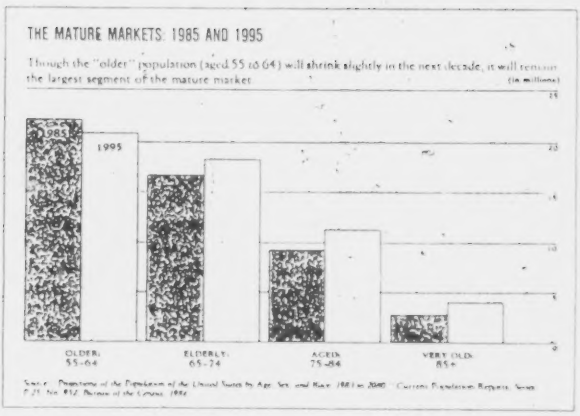
In total, the mature market will grow from about 51 million in 1985 to 56 million in 1995, representing one-fifth of all Americans. It is too large and profitable a market to ignore.

HARDLY OLD

From a marketing perspective, today's 55-to-64-year-olds can hardly

William Lazer is the Eugene and Christine Lynn Eminent Scholar in Business Administration at Florida Atlantic University, Boca Raton, Florida.

The Magazine Created for
Mature Floridians
GOLDEN
YEARS.
(305) 725-4888
233 E. New Haven Ave. • Melbourne, FL 32901


THE MATURE MARKETS: 1985 AND 1995
Though the "older" population (aged 55 to 64) will shrink slightly in the next decade, it will remain the largest segment of the mature market.
(in millions)
1985
1995
OLDER: 55-64
ELDERLY: 65-74
AGED: 75-84
VERY OLD: 85+

be considered old based on their outlook, activities, interests, and lifestyles. They are more akin to people in their 40s during the 1950s and 1960s. They are keenly interested in maintaining a youthful appearance and are prime markets for exercise equipment, health programs, diets, cosmetics, cosmetic surgery, sports clothing, designer wear, and the gamut of personal services that improve appearance. They lead active lives, participating in leisure endeavors, tennis, golf, cycling, fishing, boating, camping, jogging, and swimming. They represent a market for travel and spectator activities, and their orientation is one of working to live and not living to work. Increasing numbers of olders are taking early retirement or moving into new careers and part-time jobs.

Similarly, the 65-to-74-year-olds, the elderly, also resemble far younger people of past generations in their attitudes, education, income, use of leisure time, health, and marital status. Increasingly, businesses will encounter elderly people who act much younger in the marketplace than past marketing experiences and their chronological age would suggest.

The elderly are well into their retirement years, although some continue to work at least part-time. They are especially oriented to such personal maintenance activities as nutrition and health. They are more concerned than the general population with diet, salt intake, cholesterol, fried foods, and calories. They are opting for lighter foods and beverages—turkey, fish, chicken, and diet drinks. They tend to consume less alcohol than the younger population and they are a good market for skin care products, prescriptions, vitamins and minerals, health and beauty aids, and medicines that ease pain and promote the performance of everyday activities. They also engage in exercise, though less strenuously than 55-to-64-year-olds.

Even though people 65 and over have historically spent more on food at home rather than away from home, this pattern will likely reverse as restaurants cater to the elderly with senior-citizen discounts, early-bird dinners, and menus designed for their tastes and requirements. Most of the services that elderly Americans once performed for themselves, such as lawn care, painting, snow removal, house cleaning, and cooking, will be purchased outside the home. The elderly represent a significant market for the condominiums of the sunshine states, time-sharing arrangements, leisure activities, and luxury items that appeal to their children and grandchildren.

The 75-to-84-year-olds, the aged, fit the senior citizen image much better than people aged 65 to 74. With health often a problem for them and their mobility limited, the aged often require health care services and special care facilities. They are oriented to their extended families, are often lonesome, and are concerned about financial security. For many, their fully paid homes are their most important assets.

People aged 85 and over are the true elderly of our society, and they are different from the rest of the mature market. They are not as independent as more youthful older Americans; many require support services to do everyday tasks. They lack mobility and require regular medical and hospital care. The very old represent a large and growing market for many health and living

trons show that the income of married couples aged 55 to 64 approaches that of their young married sons and daughters. Because their family size is much smaller, however, their incomes go further. But for older people who live alone, incomes are lower, making them feel more insecure than they need to about their financial well-being. This feeling of insecurity affects how they spend their money, because it translates into conservative purchasing patterns. Even though they are able to afford a more luxurious lifestyle, they are less likely to indulge themselves. At the same time, however, they are willing to spend freely on their children and grandchildren. There is opportunity here for marketers who can convince mature consumers that they can afford to spend on themselves.

While the number of households headed by 55-to-64-year-olds is expected to remain at a little over 12 million from now to 1995, the number of households headed by people 65 and older will increase from 18 million to over 21 million.

Over 60 percent of 55-to-64-year-old householders in 1980 had incomes below $25,000. By 1995, the share with incomes below $25,000 will fall to 49 percent. The share with incomes of $50,000 and more will nearly double by 1995, from 9 percent to 16 percent.

Households headed by married couples aged 55 to 64 will gain significantly in income between 1980 and 1995. Nearly one in four will have incomes of $50,000 and over, up from one in eight in 1980. Two-thirds of these older households will be in the $25,000 and over category by 1995.

Since married couples aged 55 to 64 are usually free of most of the financial burdens associated with child rearing, housing and furnishings, they are more likely to spend on themselves. And while their incomes are not as high as consumers in their 40s and early 50s, they are an attractive market for discretionary purchases such as travel, leisure activities, vacation homes, time-sharing arrangements, personal-care products and services, leisure clothing, hobbies, sporting activities, self-improvement programs, cultural events, wide varieties of clubs and associations, and active participation in community and non-profit organizations. Currently, older people tend to spend less than they can afford and often make do with the products they have. But if they can be convinced of their financial independence, recognizing that they have adequate resources for normal contingencies, they will opt for a higher standard of living.

Today's householders aged 65 and over worked during periods of relatively poor pension and medical benefits compared with those who will retire in the coming decades. In the future, a larger share of the income of mature households will come from earnings, property income, and private pensions, with Social Security declining in importance as a source of retirement income. Earnings and property income offer opportunities for greater returns than Social Security, giving mature consumers feelings of greater independence and security, providing them with the psychological boost to spend and enjoy life.

Among households headed by people aged 65 and older, the largest share is in the income category under $10,000, accounting for over 55 percent of such households in 1980 and 47 percent in 1995. Households with incomes under $20,000 accounted for up over 82 percent of households headed by people aged 65 and older in 1980, and will decline to 76 percent by 1995. The number of households with incomes of $25,000 and over will grow by nearly 12 million. By 1995, 16 percent of households headed by persons aged 65 and older will have an income of $25,000 or more.

Married-couple households headed by people 65 and older have higher incomes than elderly people who live alone. In 1995, more than 37 percent of married-couple households will have incomes of $20,000 and over, up from 28 percent in 1980.

Looking at such income statistics alone, one might conclude that households headed by people 65 and older constitute a poor market. Yet marketers must exercise caution in drawing conclusions about their purchasing power, because these households have fewer people, their financial obligations are lower, and they receive a variety of noncash benefits. Also, some of the mature consumers have chosen to work less, with the result that they have lower incomes, but more leisure time.

Income statistics alone do not define economic well-being, and good estimates of the purchasing power of older Americans do not exist. About 75 percent of those 65 and older own their homes, with 84 percent of the homes owned free and clear. While many mature consumers have wealth in assets but no ready cash generated by wages, new financial instruments can turn their assets into cash. The reverse annuity mortgage is a loan secured by the home, providing older homeowners with a monthly payment as long as they live. It guarantees lifetime tenancy with the loan being repaid when the home is sold. This assured income for mature householders, accompanied by the security of having use of their homes, will engender a greater willingness to spend for discretionary items.

Changes lie ahead in the purchasing behavior of mature households. At present, only 9 percent of the elderly have a college degree, and only about 44 percent graduated from high school. By 1995, the share of older people with a college degree will rise to more than 12 percent, and over one-fourth will have some college education. Educated, mature consumers will be involved in more cultural activities—the arts, painting, books, symphonic music, and operas. They will seek a more graceful and elegant lifestyle, and their increasing incomes and rising levels of education will bring their consumption patterns more into line with those of younger consumers. ●

tions show that the income of married couples aged 55 to 64 approaches that of their young married sons and daughters. Because their family size is much smaller, however, their incomes go further. But for older people who live alone, incomes are lower, making them feel more insecure than they need to about their financial well-being. This feeling of insecurity affects how they spend their money, because it translates into conservative purchasing patterns. Even though they are able to afford a more luxurious lifestyle, they are less likely to indulge themselves. At the same time, however, they are willing to spend freely on their children and grandchildren. There is opportunity here for marketers who can convince mature consumers that they can afford to spend on themselves.

While the number of households headed by 55-to-64-year-olds is expected to remain at a little over 12 million from now to 1995, the number of households headed by people 65 and older will increase from 18 million to over 21 million.

Over 60 percent of 55-to-64-year-old householders in 1980 had incomes below $25,000. By 1995, the share with incomes below $25,000 will fall to 49 percent. The share with incomes of $50,000 and more will nearly double by 1995, from 9 percent to 16 percent.

Households headed by married couples aged 55 to 64 will gain significantly in income between 1980 and 1995. Nearly one in four will have incomes of $50,000 and over, up from one in eight in 1980. Two-thirds of these older households will be in the $25,000 and over category by 1995.

Since married couples aged 55 to 64 are usually free of most of the financial burdens associated with child rearing, housing and furnishings, they are more likely to spend on themselves. And while their incomes are not as high as consumers in their 40s and early 50s, they are an attractive market for discretionary purchases such as travel, leisure activities, vacation homes, time-sharing arrangements, personal-care products and services, leisure clothing, hobbies, sporting activities, self-improvement programs, cultural events, wide varieties of clubs and associations, and active participation in community and non-profit organizations. Currently, older people tend to spend less than they can afford and often make do with the products they have. But if they can be convinced of their financial independence, recognizing that they have adequate resources for normal contingencies, they will opt for a higher standard of living.

Today's householders aged 65 and over worked during periods of relatively poor pension and medical benefits compared with those who will retire in the coming decades. In the future, a larger share of the income of mature households will come from earnings, property income, and private pensions, with Social Security declining in importance as a source of retirement income. Earnings and property income offer opportunities for greater returns than Social Security, giving mature consumers feelings of greater independence and security, providing them with the psychological boost to spend and enjoy life.

Among households headed by people aged 65 and older, the largest share is in the income category under $10,000, accounting for over 55 percent of such households in 1980 and 47 percent in 1995. Households with incomes under $20,000 accounted for up over 82 percent of households headed by people aged 65 and older in 1980, and will decline to 76 percent by 1995. The number of households with incomes of $25,000 and over will grow by nearly 12 million. By 1995, 16 percent of households headed by persons aged 65 and older will have an income of $25,000 or more.

Married-couple households headed by people 65 and older have higher incomes than elderly people who live alone. In 1995, more than 37 percent of married-couple households will have incomes of $20,000 and over, up from 28 percent in 1980.

Looking at such income statistics alone, one might conclude that households headed by people 65 and older constitute a poor market. Yet marketers must exercise caution in drawing conclusions about their purchasing power, because these households have fewer people, their financial obligations are lower, and they receive a variety of noncash benefits. Also, some of the mature consumers have chosen to work less, with the result that they have lower incomes, but more leisure time.

Income statistics alone do not define economic well-being, and good estimates of the purchasing power of older Americans do not exist. About 75 percent of those 65 and older own their homes, with 84 percent of the homes owned free and clear. While many mature consumers have wealth in assets but no ready cash generated by wages, new financial instruments can turn their assets into cash. The reverse annuity mortgage is a loan secured by the home, providing older homeowners with a monthly payment as long as they live. It guarantees lifetime tenancy with the loan being repaid when the home is sold. This assured income for mature householders, accompanied by the security of having use of their homes, will engender a greater willingness to spend for discretionary items.

Changes lie ahead in the purchasing behavior of mature households. At present, only 9 percent of the elderly have a college degree, and only about 44 percent graduated from high school. By 1995, the share of older people with a college degree will rise to more than 12 percent, and over one-fourth will have some college education. Educated, mature consumers will be involved in more cultural activities—the arts, painting, books, symphonic music, and operas. They will seek a more graceful and elegant lifestyle, and their increasing incomes and rising levels of education will bring their consumption patterns more into line with those of younger consumers. ▪

■ **DREAM HOUSE. A group of senior citizens searching for a house recently were** polled by *Professional Builder* magazine on what features they most desired. Their responses sounded similar to those from young, urban professionals. Asked what age group they preferred living around, 67.6 percent said a mix of all ages. Only 25 percent said an "adults only" environment; 7 percent preferred a retirement community. A majority said they wanted a walk-in closet in the master bedroom and two additional bedrooms. Asked what amenities they wanted their community to have, 71 percent said a swimming pool. Other amenities they wanted were a craft shop, a golf course, movies and entertainment, and hiking or biking trails.

BILL WITSBERGER/SENTINEL

■ **RESORT RESEARCH. Resort areas around the country are booming. As a result, the** National Association of Home Builders has formed a Resort Marketing Committee to monitor current trends in the resort development industry. The chairman of the new committee is Rodney W. Engard, president of Hilton Head Company Realty. Engard said the committee will study coastal resort areas as well as inland resorts in mountainous and water-oriented areas, which have become very popular with developers and buyers. "More and more people seem to be escaping the cities for resort areas, and builders want to diversify themselves to keep pace with this trend," Engard said.

The Orlando Sentinel

Sunday, June 29, 1986

JAY STEVEN LEVINE, P.A.
A PROFESSIONAL ASSOCIATION OF ATTORNEYS

North Palm Beach & Administrative Offices
The North Pointe Building
824 U.S. Highway One, Suite 310
North Palm Beach, Florida 33408
(305) 626-4700

Stuart
Commerce Plaza at Colorado Avenue
14 East Seventh Street, Suite 8
Stuart, Florida 33497
(305) 288-0124

Vero Beach
70 Royal Palm Boulevard, Suite C
Vero Beach, Florida 32960
(305) 569-2405
Ft. Pierce Number **(305) 461-1499**

Boca Raton
NCNB Bank Building
2000 West Glades Road, Suite 206
Boca Raton, Florida 33431
(305) 394-3307

Jay Steven Levine
Anne M. Desormier
Edward Dicker
Jeffrey Frank

April 24, 1987

reply to:
North Palm Beach

Senator Edward M. Kennedy
315 Russell Senate Building
Washington, D.C. 20510

FEDERAL EXPRESS

RE: Senate Bill S.558 (Fair Housing Amendments Act of 1987)

Dear Senator Kennedy:

Pursuant to discussions with your office, I enclose a proposed draft of an Amendment which creates an additional exemption to the familial status provision of the Act, to wit: qualified adult community association developments. The reason that I am proposing the additional exemption is the inadequacy of the exemption presently in Section 807. The current exemption appears to apply to retirement homes, nursing homes, adult congregate living facilities and the like, with medical/nursing care, meal plans and structured social activities. Unfortunately, most adult communities do not fall into such categories, and unless clarified, the result of the Bill could be disastrous to the adult community.

The enclosed exemption is succinctly stated in the first sentence of the Amendment, which adds a Section 807A to the title. The remainder of the Amendment defines the key terms: Adult Community Association Development; Qualified Adult Community Association Development; Person(s) related to the Developer; offered for sale; and Developer.

The enclosed Amendment strikes a fair balance between (a) my chief concern which assures the right of a person to purchase housing which guarantees that person an "adults only" environment; and (b) what your staff informs me to be your chief concern: to assure adequate rental housing where in short supply to families, particularly minorities with large families who are unable to find adequate rental housing because of their children.

Throughout, I ensured that "strict" rental housing cannot enjoy the exemption under Section 807A, that is enjoyed by "purchased" housing. The following is the drafter's intention with respect to the exemption:

(a) By the definition of "Adult Community Association Development" in Section 807A(b)(1), an owner of a "strict" rental housing complex must spend from $5,000.00 to $20,000.00 to put into place, the necessary documentation to establish the Development. This cost will act as a negative incentive for such an owner to attempt to come within the exemption.

(b) To be a "Qualified Adult Community Association Development" (Section 807A(b)(2)), a majority of the Units must be either sold by the Developer under a development plan or owned by persons who are not related to the Developer. "Strict" rental complex owners would have to jeopardize loss of control of ownership in the complex to come within the exemption. Such owners are unlikely to jeopardize that control.

(c) Between Sections 807A(b)(2), 807A(b)(3) and 807A(b)(4), any possible subterfuge is frustrated by denying to "strict" rental complex owners the ability to creatively contract or structure a business arrangement or sales to come within the exemption.

(d) Finally, the last definition (807A(b)(4)) generically defines "Developer" of the Community.

Community Association Development housing is not in short supply anywhere in the United States - to my knowledge - for residence by families with children. Statistically, only about 25% of the Community Association Developments are age restricted. Therefore, housing in the "purchased" market is more than adequate for families with children. As such, the threat which Senate Bill S.558 poses to adult communities must be removed. The Bill, as it applies to Adult Community Association Developments does not protect any real need yet it discriminates against older persons who covenant to live in housing which age restricts. Keep in mind that statistically, 50% of the U.S. population by the year 2000 will be living in community association developments; as the U.S. population ages, more and more of these developments will want to age restrict. It is important to preserve these rights in the face of increasing demand.

The only real "ill" under the enclosed amendment is a possibility of a couple purchasing a unit, agreeing not to have children reside therein, and then having a child and having to leave. Or the possibility that a person in such a community will become a forced guardian of a child and be unable to reside there with the child. These results must be mandated because each person who owns and/or resides in the adult community agrees to abide by the Governing Documents which are for the benefit of all owners and residents in the Community. Covenants running with the land must be enforceable to this extent.

To perhaps put the cart before the horse, I originally came to Washington to seek an exemption for familial status for all housing, "strict" rental complexes included. Perceiving your concern to ensure adequate rental housing, I drafted the enclosed amendment which does assure "strict" rental housing and approximately 75% of the "purchased" housing communities to families with children. To help the owners of "strict" rental housing complexes, you might consider a "vacancy rate" threshold where over a certain percentage vacancy as officially published, age restricting is then permitted. Remember that there are rental units available from owners of "purchased" units to supplement the "strict" rental market.

To assure the qualified status of an Adult Community Association Development, you might consider a simple exemption filing (similar to the Homestead Exemption filing in most states) for a community desirous of the status of a Qualified Community Association Development under the Act. Although it is my preference to avoid the cost of such administration, I offer it only if it may allay any concerns you might have.

I am planning another trip to Washington in the early to middle of May and would like the opportunity to meet with you to discuss the enclosure. I will contact you next week when I know the dates I will be in Washington.

Your favorable consideration of Section 807A is appreciated.

Very truly yours,

Jay Steven Levine

Enclosure - as stated

cc: See attached list

JSL/sgt
F:INFO558.09/11

Senator Joseph R. Biden, Jr.
Senator Robert C. Byrd
Senator Lawton Chiles
Senator Dennis DeConcini
Senator Bob Graham
Senator Charles E. Grassley
Senator Orrin G. Hatch
Senator Howell T. Heflin
Senator Gordon J. Humphrey
Senator Patrick J. Leahy
Senator Howard M. Metzenbaum
Senator Paul Simon
Senator Alan K. Simpson
Senator Strom Thurmond
Congressman Charles E. Bennet
Congressman Howard L. Berman
Congressman Michael Bilirakis
Congressman Rick Boucher
Congressman Jack Brooks
Congressman John Bryant
Congressman Benjamin L. Cardin
Congressman Bill Chappell, Jr.
Congressman Howard Coble
Congressman John Conyers, Jr.
Congressman George W. Crockett, Jr.
Congressman William F. Dannemeyer
Congressman Michael DeWine
Congressman Dante B. Fascell
Congressman Edward F. Feighan
Congressman Hamilton Fish, Jr.
Congressman Barney Frank
Congressman George W. Gekas
Congressman Sam Gibbons
Congressman Dan Glickman
Congressman Bill Grant
Congressman William J. Hughes
Congressman Earl Hutto
Congressman Henry H. Hyde
Congressman Andy Ireland
Congressman Robert W. Kastenmeier
Congressman William Lehman
Congressman Tom Lewis
Congressman Dan Lungren
Congressman Buddy MacKay
Congressman Romano L. Mazzoli
Congressman Bill McCollum
Congressman Dan Mica
Congressman Carlos J. Moorhead
Congressman Bruce A. Morrison
Congressman Bill Nelson
Congressman Peter W. Rodino, Jr.
Congresswoman Patricia Schroeder
Congressman Charles E. Schumer
Congressman F. James Sensenbrenner, Jr.
Congressman E. Clay Shaw, Jr.
Congressman D. French Slaughter, Jr.
Congressman Lamar S. Smith
Congressman Lawrence J. Smith
Congressman Harley O. Staggers, Jr.
Congressman Patrick L. Swindall
Congressman Mike Synar
Congressman C. W. Bill Young

SECTION 6. DISCRIMINARY HOUSING PRACTICE AMENDMENTS...

(f) The Act is amended by adding the following:

"ADULT COMMUNITY ASSOCIATION DEVELOPMENT EXEMPTION

"Sec. 807A. (a) Exemption provided - In addition to the exemption under Section 807 of the Act, nothing in this title regarding familial status shall apply to any Qualified Adult Community Association Development, qualified for the exemption under Section 807A.

"(b) Definitions; Criteria -

"(1) 'Adult Community Association Development' means a residential community governed by one or more condominium associations, cooperative associations, homeowners associations, mobile homeowners associations, community associations, or similar entity or entities recognized under applicable state law, in which Community there are covenants which run with the land, one of which restricts the minimum age for permanent occupancy in the said Community.

"(2) 'Qualified Adult Community Association Development' means an Adult Community Association Development, as defined in Section 807A(b)(1) next above, which meets the following requirements. A Community shall be deemed a Qualified Adult Community Association Development for that duration in which the following requirements are met:

"(A) A majority of the Units in the Community (or in the case of a cooperative association development, a majority of the shares of stock in the cooperative association) must either be:

"(i) Offered for sale by the Developer, to the general public, and not limited to persons related

to the Developer of the said community; or

"(ii) Owned by persons who are not related to the Developer of the said Community.

"In the event that more than one Community Association governs an Adult Community Association Development, said Adult Community Association Development shall be a Qualified Adult Community Association Development as long as any of the said governing Community Associations fulfill the requirements of this Section 807A.

"(3)(A) 'Person(s) related to the Developer' means any person(s) who is/are:

"(i) Engaged in a business relationship with the Developer whether through partnership, joint venture or contract, wherein said person is to share in the profits or losses of the Community Association Development; or

"(ii) Related by blood, marriage or adoption to the Developer or to the controlling or managing principals of the Developer entity; or

"(iii) Maintaining a direct or indirect controlling interest or managerial or executive authority in the Developer entity, or under the administrative, operational or legal control of the Developer entity.

"(3)(B) 'Person(s) related to the Developer' shall not include the following, as long as said person(s) do(es) not fall within the purview of Section 807A(3)(A) above:

"(i) Person(s) having a debtor-creditor relationship with the Developer; or

"(ii) Person(s) under contract to purchase units in the Adult Community Association Development (or in the case of a cooperative association development, shares of stock in the cooperative association); or

"(iii) Person(s) who invest(s) in the Developer entity; or

"(iv) Person(s), including the Developer or an affiliate of same, who provide(s) brokerage, leasing and/or management services to a person who purchased unit(s) in the Community (or in the case of a cooperative association development, shares of stock in the cooperative association).

"(4) 'Offered for Sale by the Developer' shall require a bona fide marketing or sales program intended to result in the transfer of title of units (or shares of stock in the case of a cooperative association development) in the Developer's ordinary course of business.

"(5) 'Developer' means the sponsor or declarant defined as such under the applicable law or Governing Documents for the Adult Community Association Development, or the Developer's successors, assigns and legal representatives, who at the particular time, is offering Units for sale (or in the case of a cooperative association development, shares of stock in the cooperative association) for sale in the Adult Community Association Development."

JAY STEVEN LEVINE, P.A.
A PROFESSIONAL ASSOCIATION OF ATTORNEYS

North Palm Beach & Administrative Offices
The North Pointe Building
824 U.S. Highway One, Suite 310
North Palm Beach, Florida 33408
(305) 626-4700

Stuart
Commerce Plaza at Colorado Avenue
14 East Seventh Street, Suite 8
Stuart, Florida 33497
(305) 288-0124

Vero Beach
70 Royal Palm Boulevard, Suite C
Vero Beach, Florida 32960
(305) 569-5400
Ft. Pierce Number **(305) 461-1699**

Boca Raton
NCNB Bank Building
2000 West Glades Road, Suite 206
Boca Raton, Florida 33431
(305) 394-2307

Jay Steven Levine
Anne M. Desormier
Edward Dicker
Jeffrey Frank

April 29, 1987

reply to
North Palm Beach

To: The Members of Senate Judiciary Committee

RE: Supplemental Position Statement following up the testimony of Jay Steven Levine on April 9, 1987 before the Subcommittee on the Constitution, Senate Judiciary Committee - Senate Bill S.558 (Fair Housing Amendments Act of 1987)

The following supplements my testimony before the Subcommittee on the Constitution, Senate Judiciary Committee and is based upon dozens of meetings; radio, newspaper and television interviews; and conversations with persons who are "pro" and "con" to the familial status provisions of the Bill as it affects the adult community association development.

1. As I have mentioned in my testimony on April 9, 1987 before the Senate Judiciary Committee's Subcommittee on the Constitution, the exemption in Section 807 of the Bill, in referring to "bona fide retirement communities ... equipped with facilities and amenities specifically designed to meet the physical and social needs of [older] persons.", will apply only to retirement homes, nursing homes, adult congregate living facilities and the like, with medical/nursing care, meal plans and a structured social environment. As such, older persons who must or prefer to live in an "adults only" environment, will be forced to live in a nursing home, etc. Such housing is degrading and dehabilitating to an older person who does not really require the structured environment associated with the nursing home, etc. For, this sort of environment imparts finality to one's life, which the typical adult community association development does not. The Bill would have a disastrous effect on the mental welfare of millions of older Americans, who will now be forced to reside in communities which are suited to persons who are incapable of fending for themselves. Furthermore, nursing home type communities are much more costly than adult community association developments because of the medical/nursing staff, meal plans and structured environment associated with the former; few older persons can afford such housing.

2. The fact that older persons may choose to live among "adults only" and not among families with children does not mean that these older persons dislike children, or that they are inconvenienced by the presence of children. In fact, statistically, older persons tend to vote in favor of governmental measures and programs which help children - as much or more so than other groups of Americans. Furthermore, the Governing Documents of adult community association developments always permit the temporary occupancy of children - for visitation purposes. Older persons thus do encourage contact with their children and grandchildren as visitors, but still need or prefer to live among adults as the permanent residents. Many older persons are physically and mentally unable to cope with the typical (and expected) conduct accompanied with children, such as vandalism and excessive noise. Unfortunately, the medical profession would be unable to diagnose most older Americans as having a medical need to live in a community without children as permanent occupants. And if the medical profession could, how many older persons in a community must be so diagnosed before the community can enjoy the Section 807 exemption? And how often must the diagnosis be made, as residents change? Needs and preferences to living among "adults only" for millions of older Americans should not be relegated to the status of "inconvenience" and then ignored as contrary to an ill-conceived public policy.

3. There have been concerns expressed to me for the "hardship" case, where a grandparent becomes a forced guardian of a child or children - perhaps when the parents have been killed or are unfit to serve as natural guardians of their children. If such a concern does exist among legislators in Washington, I would consider adding an exception to the Section 807A Adult Community Association Development Exemption I have proposed to the House and Senate Judiciary Committees, allowing the residence of children where a guardianship has been created by Court Order, for the duration of the guardianship.

Very truly yours,

Jay Steven Levine

JSL/rvb

R:AM.HOUSE/01

CC: Senator Edward M. Kennedy
: Senator Arlen Spector
: Congressman Don Edwards

Senator KENNEDY. The third panel are two legal experts in the field of discrimination: Bonnie Milstein, an attorney from Washington, DC, formerly Deputy Assistant General Counsel for Civil Rights in the Department of Health and Human Services. Ms. Milstein will testify about the background of the definition of handicap included in our bill, which is taken from the Rehabilitation Act of 1973. We are glad to have you here today. Prof. Robert Schwemm of the University of Kentucky, who wrote "the book" about housing discrimination. Professor Schwemm will address some of the issues that have been raised in these hearings. We are very pleased to have you here today.

Ms. Milstein, we will start with you.

A PANEL CONSISTING OF BONNIE MILSTEIN, ATTORNEY, WASHINGTON, DC; AND ROBERT G. SCHWEMM, PROFESSOR OF LAW, UNIVERSITY OF KENTUCKY LAW SCHOOL

Ms. MILSTEIN. Thank you, sir.

It is my distinct pleasure to be testifying before this Committee today, Mr. Chairman and Mr. Specter. I am a strong supporter of S. 558, and as you said, I have been asked to testify solely on the definition of handicap that appears in the Fair Housing Act Amendments.

It is, of course, the same definition that appears in the Rehabilitation Act of 1973 as it was amended in 1974. It was specifically amended to clarify the definition.

Senator KENNEDY. A change of the guard here.

Senator SIMON. I apologize. I want to thank my colleague, Senator Kennedy, as well as Senator Specter, for being here when I had a little announcement in another room.

Please continue.

Ms. MILSTEIN. Thank you, Senator Simon.

I am testifying on the definition of handicap in the Fair Housing Act Amendments of 1987. The definition is the same definition that appears in the Rehabilitation Act as it was amended in 1974. The Rehabilitation Act was specifically amended in 1974 to clarify the word "handicap." That definition includes any person who has a physical or mental impairment which substantially limits one or more of such person's major life activities, has a record of such an impairment, or is regarded as having such an impairment.

There have been suggestions that that definition is not the correct definition for the Fair Housing Act, and I would submit that those suggestions are incorrect.

There are three reasons why this definition is the correct definition to include in the Fair Housing Act. The first is a very straightforward reason, and that is that ever since 1974, this has been the definition that has been used by all of the Federal agencies which have issued regulations concerning handicap and disabilities. It is the definition that has been used by all the courts to have heard litigation on questions of disability. And it is the definition that has been used by States in their amendments of their constitutions and in their enactments of regulations and State statutes.

Therefore, we have a substantial body of law that is based upon this specific definition. If one were to adopt another definition, one

would not be able to use this body of law and, in fact, a new definition would generate needless and confusing litigation.

Now, while it is possible that there might be another definition that would be better than this definition, none of the proposals that I have read would, in fact, be better. In fact, one that is proposed in Senator Hatch's bill distinguishes among disabilities. That poses some very serious problems.

First of all, it focuses attention on the disability rather than on the person. It suggests that some disabilities are more worthy than other disabilities; that some people who have certain disabilities are to be shunned because their disabilities are so frightening; whereas, other people who have other disabilities that are more understandable or are more common are okay, and the needs and rights of those people can be addressed.

That specious and discriminatory philosophy, of course, is one of the reasons that the Congress enacted the Rehabilitation Act in 1973: to identify the fact that actions and attitudes based on disabilities, as opposed to a focus on people's abilities, resulted in discrimination. It was based on generalizations and on prejudice and not on objective data, which, of course, should be the basis for all rational decisionmaking.

The third reason that this is the appropriate definition for the Fair Housing Act has to do with safety concerns that have been raised, again by Mr. Hatch's proposed definition. When the Congress enacted the Rehabilitation Act in 1973 and amended it in 1974, because there had not been much of an opportunity to understand what this particular Civil Rights Act would do in the context of employment or education or housing, several companies were very concerned that the Rehabilitation Act would limit their ability to discipline employees. Airline carriers were specifically concerned that they would not be able to discipline pilots who had drug or alcohol problems.

Therefore, in 1978, Congress enacted an amendment to the Rehabilitation Act that focused specifically not on the possession of the disability of drug abuse or alcoholism, but on the ability to do the job. Thus, the amendment to the Rehabilitation Act says if an employee is incapable of performing the essential requirements of the job, then that person may be subjected to whatever the normal employment disciplinary actions are that apply to any other employee.

It has been clear, both in litigation and as recently as the most recent Supreme Court case on the Rehabilitation Act, that the definition that the Fair Housing Act has adopted from the Rehabilitation Act addresses safety concerns, supports and promotes public health laws—both Federal public health laws and State public health laws—and addresses discrimination from the correct perspective of separating behavior that is unacceptable from a disability that in and of itself poses no danger and no safety risk.

Thank you.

[The prepared statement of Ms. Milstein follows:]

PREPARED STATEMENT OF BONNIE MILSTEIN

ATTORNEY

Mr. Chairman and Members of this Subcommittee:

I appreciate the opportunity that you have given me to testify on the Fair Housing Amendments Act of 1987. As Deputy Assistant General Counsel for Civil Rights in the Departments of Health, Education and Welfare and Health and Human Services, and later, as counsel to the Consortium of Citizens with Developmental Disabilities, I have had considerable experience with the enforcement of civil rights statutes. It is because of this experience that I have been asked to testify on the handicap discrimination provisions of S.558, the Kennedy-Specter Bill.

It is my opinion that the definition of "handicap" in S.558 accurately reflects the intent of the Congresses responsible for the enactment of the Fair Housing Act of 1968 and Section 504 of the Rehabilitation Act of 1973, as amended. The latter statute is the analog to Title VI of the Civil Rights Act of 1964, and it prohibits discrimination on the basis of handicap by recipients of federal financial assistance in all fields of endeavor, including housing. The purposes of each of these statutes was to reaffirm the American ideal of equality and justice, and to encourage rational actions based upon objective data.

The definition of handicap in S.558 is the same definition that appears in the Rehabilitation Act at Section 7B S.558, and reads as follows:

Sec.5(h) 'Handicap' means, with respect to a person--

"(1) a physical or mental impairment which substantially limits one or more of such person's major life activities,

"(2) a record of having such an impairment, or

"(3) being regarded as having such an impairment."

This definition has been used by every federal agency to have issued regulations implementing Section 504 of the Rehabilitation Act. (The only agency which has not issued Section 504 regulations is the Department of Housing and Urban Development.) A list of those regulations is appended to this testimony. Thus, inclusion of this definition in the Fair Housing Amendments Act of 1987 would perpetuate the consistent interpretation of handicap discrimination among all federal agencies, with regard to federally assisted and federally operated housing. With regard to private housing, it would similarly ensure the consistent interpretation of the obligations of landlords toward tenants with disabilities.

Further, many states have issued their own constitutional amendments, statutes, and regulations on handicap discrimination. They have used the federal statute and regulations as their model. As a result, the caselaw that has developed since the promulgation of the first Section 504 regulations in 1977, has been based upon the definition adopted by S.558.

In testimony before this Committee, several witnesses have recommended the adoption of a radically different definition of handicap. For example, the definition in S.867 reads:

"(h) 'Handicap' means, with respect to a person, a physical impairment which substantially limits the capacity to see, hear, or walk unaided or the capacity to live completely unattended. Such term does not include any alcohol, drug abuse, or any other impairment which would be a threat to the safety or the property of others."

The first change that this definition introduces is to limit the kinds of impairments that would qualify a person as a handicapped person who is entitled to the protections of this Act. Only those whose vision, hearing, and walking are substantially limited, and those who are unable to live completely unattended, are included. By introducing a definition of "handicap" that is different from the Rehabilitation Act definition, interpretations of the Fair Housing Act will be divorced from the body of law that has developed to interpret the Rehabilitation Act. Not only will a new definition generate needless litigation, but, it may well lead to results tht are contrary to those intended by the framers of S.867.

Equally problematic, however, is the fact that this definition excludes millions of people who are subjected to discriminatory actions and attitudes on a daily basis. These include individuals who have difficulty speaking and learning. It includes those who have emotional impairments. It includes those with hidden disabilities, like mental retardation and epilepsy, who must keep them hidden lest landlords evict them because of irrational beliefs that those with such disabilities are contagious, or present other imagined dangers.

Section 504 was enacted precisely to combat the kind of discrimination that is based on the irrational belief that the world of people with disabilities is inhabited by those with pitiful, but understandable handicaps, and those with frightening handicaps, to be avoided and shunned. The Congress discarded those images in 1973. It neither distinguished among those whose major life activities are substantially limited, nor among those who had a history of such impairments, nor among those who were simply regarded by others as having such impairments. The Congress enacted the definition of "handicap" that it did because it recog-

nized that handicap discrimination, like race discrimination, resulted from the ignorance and prejudice of its perpetrators, and not because of any fault on the part of or distinctions among its victims. Therefore, to distinguish among different types of disabilities would be akin to discriminating among different shades of skin color, and would fail to address the causes of discriminatory behavior. There is no need to retrace those steps, once again.

Several witnesses have also recommended limiting the definition even further, by excluding "any alcohol, drug abuse, or any other impairment which would be a threat to the safety or the property of others." No civil rights statute has ever been interpreted to ignore objective safety concerns. Indeed, "impairments" don't pose threats; criminal or dangerous behavior poses threats. Nothing in S.558 would limit a landlord's ability to refuse to rent or to evict a tenant who is engaging in such behavior. On the other hand, the S.867 amendment would permit landlords to refuse to rent an apartment to a tenant with cerebral palsy because of the landlord's belief that the tenant would fall down stairs, or would strike another tenant involuntarily, or would be incapable of maintaining the property. Obviously, housing applicants who had cerebral palsy, or who used wheelchairs, or who had a history of mental illness, could allay such fears, but they would never get the chance to do so under S.867. Any impairment would become "a threat to the safety and property of others" if S.867 were to become law.

Current state and federal housing law requires all tenants to refrain from interfering with their neighbors' peaceful enjoyment of their property and to maintain their property in a safe, sanitary, decent condition. HUD's own Model Lease for Subsidized Programs requires the tenant to agree not to "make or permit noises or acts that will disturb the rights or comforts of

neighbors." (Item 13, General Restrictions.) The tenant is further required to obey additional tenancy rules if "the rules are reasonably related to the safety, care, and cleanliness of the building and the safety, care, and convenience of the tenants." (Item 14, Rules.) By imposing additional requirements on applicants and tenants with disabilities, the proponents of this amendment are discouraging integration and encouraging discrimination based on biases about how well the disabled tenant will "fit in."

Finally, the Congress addressed the safety concerns raised by alcohol and drug abuse in its 1978 amendments to the Rehabilitation Act. Rejecting a proposal to ban drug and alcohol abusers from the coverage of Section 504, the Congress amended the statute to read:

> For purposes or sections 503 and 504 as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others. 29 U.S.C. Sec. 706(B).

It is clear, from this language, that the Congress understood the need to separate actual behavior from the behavior that an employer might expect from an employee he knew or believed to have been abusing drugs or alcohol. Thus, the Congress reassured employers that they could continue to discipline employees according to standard employment procedures if they failed to perform their jobs in safe and effective manners. But, the Congress also confirmed that employers could not arbitrarily discipline workers based upon unfounded beliefs or fears.

It is important to note that this section of the Rehabilitation Act applies only to drug and alcohol abuse. But caselaw interpreting safety questions in the context of Section 504 has

adopted the rationale of this amendment beyond questions of alcohol and drug abuse, for example, to school bus drivers wearing hearing aids, Strathie v. Department of Transportation, 716 F.2d 227 (3d Cir. 1983); and graduate students with multiple sclerosis, Pushkin v. Regents, 658 F.2d 1372 (10th Cir. 1981). It would not be difficult, therefore, to apply the logic of the statute, the regulations, and the cases to safety questions arising in the context of housing and S.558 would permit such consistent applications.

We encourage this Committee to continue its excellent work in support of the Fair Housing Amendments Act of 1987. If I can be of further assistance in the development of this legislation, I would be happy to do so.

Section 504 Update

Each month, the National Center receives inquiries on the status and requirements of Section 504 of the Rehabilitation Act of 1973. Though many of the Reagan administration's questions about the regulations have yet to be resolved, some progress continues to be made.

Recently, the Small Business Administration (SBA) began providing reading and interpreting assistance to blind and deaf persons using agency programs. This change of policy came about as a result of a complaint to the Small Business Administration from the National Center for Law and the Deaf. Responding to a request for guidance, Assistant Attorney General William Bradford Reynolds told the SBA that in the absence of regulations establishing procedures for implementing coverage of federally conducted programs under Section 504, SBA should use standards already established for federally assisted programs.

He further wrote: "The Attorney General's regulations require agencies to mandate that recipients of federal assistance take appropriate steps to ensure that communications with their applicants, employees and beneficiaries are available to persons with impaired...hearing 24CFR: 41.51(e)." Other federal agencies, including the Internal Revenue Service, are developing policies on the provision of services for hearing-impaired clientele. The Assistant Attorney General's letter is providing guidance to these agencies.

Recently, the U.S. Department of Justice, Civil Rights Division published a current listing of agency regulations implementing Section 504 of the Rehabilitation Act. For the convenience of our readers, the list is reproduced below.

Agency Regulations Implementing Section 504 of Rehabilitation Act

Final Rules

ACTION	45 C.F.R. Part 1232 (1982); 44 Fed. Reg. 31,018 (1979)
Agency for International Development/IDCA	22 C.F.R. Part 217 (1982); 45 Fed. Reg. 66,415 (1980)
Department of Agriculture	47 Fed. Reg. 25,458 (1982) (to be codified at 7 C.F.R. Part 15b)
Civil Aeronautics Board	47 Fed. Reg. 25,936 (1982) (to be codified at 14 C.F.R. Part 382)
Department of Commerce	47 Fed. Reg. 17,744 (1982) (to be codified at 15 C.F.R. Part 8b)
Department of Defense	47 Fed. Reg. 15,122 (1982) (to be codified at 32 C.F.R. Part 56)
Department of Education	34 C.F.R. Part 104 (1982); 45 Fed. Reg. 30,936 (1980)
Department of Energy	10 C.F.R. §§ 1040.61-.74 (1982); 45 Fed. Reg. 40,515 (1980)
General Services Administration	47 Fed. Reg. 25,337 (1982) (to be codified at 41 C.F.R. §§ 101-8.300-.313)
Department of Health and Human Services	45 C.F.R. Part 84 (1982); 42 Fed. Reg. 22,677 (1977)
Department of Housing and Urban Development	48 Fed. Reg. 20,638 (1983), as amended by 48 Fed. Reg. 20,902 (1983) (to be codified at 24 C.F.R. Part 8)
Department of Interior	47 Fed. Reg. 29,546 (1982) (to be codified at 43 C.F.R. §§ 17,200-.299
Department of Justice	28 C.F.R. §§ 42.501-.540 (1982); 45 Fed. Reg. 37,622 (1980)
Department of Labor	29 C.F.R. Part 32 (1982); 45 Fed. Reg. 66,709 (1980)
National Aeronautics and Space Administration	14 C.F.R. Part 1251 (1982); 44 Fed. Reg. 52,680 (1979)
National Endowment for the Arts	45 C.F.R. Part 1151 (1982); 44 Fed. Reg. 22,734 (1979)
National Endowment for the Humanities	45 C.F.R. Part 1170 (1982); 46 Fed. Reg. 55,894 (1981)
Nuclear Regulatory Commission	10 C.F.R. §§ 4.101-.233 (1982); 45 Fed. Reg. 14,535 (1980)
National Science Foundation	47 Fed. Reg. 8570 (1982) (to be codified at 45 C.F.R. Part 605)
Office of Personnel Management	5 C.F.R. §§ 900.701-.710 (1982); 45 Fed. Reg. 75,569 (1980)
Small Business Administration	13 C.F.R. Part 113 (1982); 44 Fed. Reg. 20,068 (1979)
Department of State	22 C.F.R. Part 142 (1982); 45 Fed. Reg. 69,438 (1980)
Tennessee Valley Authority	18 C.F.R. Part 1307 (1982); 45 Fed. Reg. 22,895 (1980)
Department of Transportation	49 C.F.R. Part 27 (1982); 44 Fed. Reg. 31,468 (1979), as amended by 46 Fed. Reg. 37,492 (1981)
Department of the Treasury	31 C.F.R. Part 51.50 (1982); 46 Fed. Reg. 48,034 (1981)
Veterans Administration	38 C.F.R. §§ 18.401-.461 (1982); 45 Fed. Reg. 63,268 (1980)

Notices of Proposed Rulemaking

Equal Employment Opportunity Commission	44 Fed. Reg. 68,482 (1979)
Environmental Protection Agency	46 Fed. Reg. 2306 (1981)

Senator SIMON. We thank you.

The final witness is Prof. Robert Schwemm of the University of Kentucky Law School. Happy to have you with us, Mr. Schwemm.

STATEMENT OF ROBERT SCHWEMM

Mr. SCHWEMM. Thank you very much, Mr. Chairman. My name is Robert Schwemm, and I am a professor of law at the University of Kentucky. I have devoted almost my entire professional life to the subject of housing discrimination law, first as a trial lawyer in Chicago and more recently as a law professor doing research in this area. In the last year, I have been a member of my State's Human Rights Commission, which has some of the powers of enforcement that this bill is contemplating at the Federal level.

I have also prepared a paper for the committee on the subject of whether the 1968 Fair Housing Act includes a discriminatory effect standard as well as a discriminatory intent standard. That is a rather lengthy paper. It goes on to some 25 pages, and it is my hope that that could be included in the record. I might just summarize briefly the conclusions that I reached in that paper.

Most of the available sources of interpretation are at the lower court level. The 1968 statute does not define the proper standard. The Supreme Court has not reviewed the law with respect to this issue, and the legislative history, although supportive of a generous construction of title VIII, is not absolutely conclusive.

The decisions of the Federal Courts of Appeals on this subject are the principal source of authority. They reflect the strong consensus, now approaching unanimity, that title VIII should be construed to prohibit discriminatory effects, at least under some circumstances. By my count, of the 12 Federal Courts of Appeals, 9 have reviewed this issue, and they have all agreed with that proposition; three have not yet passed on it; and none at this moment objects to that interpretation.

It so happens that in the field of housing discrimination law, this particular issue has not been as important in terms of the number of cases affected as it has been, for example, in the employment field. But I think the issue is important for a couple of reasons that I would like to mention briefly.

In certain types of cases, the question of whether the law prohibits discriminatory effects can be very important. These tend to be the larger impact or communitywide cases. The other reason that I think it is important that the courts have endorsed the effects standard for this law is that, as we have said today, the 1968 law is not terribly strong. And it would be very unfortunate if the courts interpreted that law, already somewhat weak, in any way that would suggest it was weaker than the employment discrimination law of 1964, which has, as you know, been interpreted by the Supreme Court to prohibit discriminatory effects under certain circumstances.

I have a couple of other comments with respect to the bill that you are considering. First of all, I applaud the effort to strengthen the enforcement mechanism. The 1968 law made a promise to the Nation that, we were told, Congress considered of the highest priority—to achieve fair housing. The problem, as you well know, is that

the enforcement mechanism of the bill did not carry out that promise or did not allow for the carrying out of that promise, primarily because it put almost the entire responsibility for enforcement on the shoulders of the victims of discrimination. The Federal Government was given a very, very small and relatively weak role. The bill that you are considering would address itself to increasing the effective role of the Federal Government in enforcing fair housing, particularly through the use of complaints to HUD followed up by hearings before administrative law judges.

I am in favor of that, and I am in favor of this bill. I have mentioned from time to time in discussions with staff that there are a few minor technical problems that I would like to work out with them, but the overall thrust of the bill is excellent and is very much needed.

I am concerned with the suggestion by some people that Senator Kennedy referred to earlier that an alternative to this system of administrative law judges might be mandatory arbitration. I do not know a great deal about mandatory arbitration, but I know enough about it to know that I have some real questions about how it would work in this area.

For example, I do not know who the arbitrators would be, whether they would be people who are knowledgeable and specialists in the area. I do not know the capacity of arbitrators to issue decisions that would include effective relief, particularly penalties if those are appropriate. I am aware of how difficult it is to get proper judicial review of the decisions of arbitrators, so I have some questions about that.

I have been asked also to touch on a subject that I know has been mentioned before the committee involving programs that are sometimes labeled "integration maintenance." Let me begin by saying that this is a very dangerous phrase, because many people use it without defining it. It can be used to talk about quotas; it can be used to talk about programs that have nothing to do with quotas. And I think the first thing we ought to do is understand what we are talking about

The other thing that I might mention with respect to this topic is that, as far as I am concerned, it is a very, very small topic in the overall field of fair housing law. As a matter of fact, I am not aware of a single case where a local government has adopted a quota that would limit minority housing opportunities in order to achieve integration.

I understand some people have suggested that this is somewhat widespread. I would like them to come forward with the evidence of that, because I am not aware of it.

It is true that a very small number of communities have made efforts, not of a quota nature, but of a pro-integration nature, to try to preserve stable, integrated communities. And let me point out briefly how important it is for those communities to be able to do those modest things, such as just advertising the fact that they are open to people of all races.

In this country, if a person wants to live in an all-white community, he has a great many places he can move and live in an all-white community. If a person wants to live in an all-black commu-

nity or predominantly black community, there are a great many places he can go to and live in such a community.

The problem in the country is that there are only a few situations for those people who might want to live in integrated communities. These situations are almost impossible to find. And often they do not last very long. In a few of these situations, communities that have decided that they would like to achieve the goal of the 1968 Fair Housing Act, which is open, integrated, and long-term stable communities, have made modest efforts to advertise that fact and to encourage people to treat their communities in such a way. If that is what integration maintenance is understood to be, I do not see that there is a great deal of problem with it.

So I would suggest, No. 1, this overall topic is something that we have to understand what we are talking about; and, No. 2 if we do understand what we are talking about, it is really not a major problem.

I know I have exceeded my time. Let me just conclude by saying that if there are any questions I would be happy to try to answer them.

[Submissions of Mr. Schwemm follow:]

STATEMENT OF ROBERT G. SCHWEMM

on the
FAIR HOUSING AMENDMENTS ACT OF 1987 (S. 558)
before the
SUBCOMMITTEE ON THE CONSTITUTION
of the
SENATE COMMITTEE ON THE JUDICIARY

April 9, 1987

My name is Robert G. Schwemm. I am a professor of law at the University of Kentucky, where I teach courses in constitutional law, civil procedure, and trial practice.

During the 1970s, I was Chief Trial Counsel for the Leadership Council for Metropolitan Open Communities, a fair housing organization in Chicago, Illinois. In connection with that work, I was the plaintiff's attorney in scores of federal fair housing cases. Many of these cases ultimately were decided by the 7th Circuit court of appeals, and two -- Village of Arlington Heights v. Metropolitan Housing Development Corp. and Gladstone, Realtors v. Village of Bellwood -- reached the Supreme Court. A partial list of my reported fair housing cases is included in the Appendix to my statement.

Since becoming a law professor, my research has been devoted to fair housing law. I have written numerous articles and two books on the subject. These writings are listed in the Appendix. I am the author of the paper submitted to this Committee on "Discriminatory Intent vs. Discriminatory Effect: The Proper Standard in Cases under the Fair Housing Act of 1968."

I also act as a consultant to practitioners and to various fair housing organizations, both private and governmental. I have spoken to lawyers' groups and others on fair housing law throughout the country.

I am currently serving as Vice Chairperson of the Kentucky Commission on Human Rights, which investigates, prosecutes, and decides cases under our state fair housing law, and I am the Vice Chairperson of the Kentucky Advisory Committee to the U.S. Commission on Civil Rights.

I appear today as a private citizen with a keen interest in fair housing law.

If the Committee has any questions on the "intent vs. effect" issue or on other matters relating to the Fair Housing Amendments Act of 1987, I would be happy to try to answer them.

Appendix to the Statement of Robert G. Schwemm

I. REPORTED FAIR HOUSING CASES

Gladstone Realtors v. Village of Bellwood:
(1) 441 U.S. 91 (1979)
(2) 569 F.2d 1013 (7th Cir. 1978)

Metropolitan Housing Development Corp. v. Village of Arlington Heights:
(1) 517 F.2d 409 (7th Cir. 1975)
(2) 429 U.S. 252 (1977)
(3) 558 F.2d 1283 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978)
(4) 469 F. Supp. 836 (N.D. Ill. 1979), aff'd, 616 F.2d 1006 (7th Cir. 1980)

Crumble v. Blumthal, 549 F.2d 462 (7th Cir. 1977)

Moore v. Townsend:
(1) 525 F.2d 482 (7th Cir. 1975)
(2) 421 F. Supp. 378 (N.D. Ill. 1976), aff'd in part and rev'd in part, 577 F.2d 424 (7th Cir. 1978)

Hairston v. R & R Apartments, 510 F.2d 1090 (7th Cir. 1975)

Morris v. Cizek, 503 F.2d 1303 (7th Cir. 1974)

Jeanty v. McKey & Poague, Inc., 496 F.2d 1119 (7th Cir. 1974)

Seaton v. Sky Realty Company, Inc., 491 F.2d 634 (7th Cir. 1974)

Johnson v. Jerry Pals Real Estate, 485 F.2d 528 (7th Cir. 1973)

II. FAIR HOUSING PUBLICATIONS

Housing Discrimination Law - Supplement (BNA: 1986)

Housing Discrimination Law (BNA: 1983)

"Compensatory Damages in Federal Fair Housing Cases," 16 Harvard Civil Rights - Civil Liberties Law Review 83 (1981).

Guide to Practice Fair Housing Law (1980) (co-author with F. Willis Caruso)

"Standing to Sue in Fair Housing Cases," 41 Ohio State Law Journal 1 (1980)

"Discriminatory Effect and the Fair Housing Act," 54 Notre Dame Lawyer 199 (1978)

"Discriminatory Purpose in Equal Protection Litigation," 77 Illinois Law Forum 961 (1977)

Tenants' Rights (chapters on discrimination) (1975; revised: 1978 & 1983) -- Illinois Institute for Continuing Legal Education

DISCRIMINATORY INTENT VS. DISCRIMINATORY EFFECT: THE PROPER STANDARD IN CASES UNDER THE FAIR HOUSING ACT OF 1968

(Paper prepared for Congressional hearings on the Fair Housing Amendments Act of 1987)

--Robert G. Schwemm

College of Law
University of Kentucky
Lexington, Kentucky 40506
March 31, 1987

Introduction

This paper addresses the issue of whether the federal Fair Housing Act (Title VIII of the Civil Rights Act of 1868)[1] bans only intentional discrimination or whether its coverage extends as well to practices with discriminatory effects.[2]

Title VIII prohibits, with certain limited exceptions, virtually every housing practice that discriminates on the basis of race, color, religion, sex, or national origin. A "discriminatory housing practice" under the statute is defined as any "act that is unlawful under section 3604, 3605, or 3606 of this title."[3] These substantive provisions are violated whenever a housing practice is undertaken "because of," "based on," or "on account of" race, color, religion, sex, or national origin.[4] The question is: Do these phrases cover practices with discriminatory effects or do they apply only to intentional discrimination?

This question cannot be answered with absolute certainty. The statute, itself, does not define what these phrases mean. The relevant legislative history is sketchy and inconclusive . The Supreme Court, which has addressed the "intent vs. effect" issue in a number of other civil rights contexts, has thus far avoided doing so in a Title VIII case. Under these circumstances, the principal authority available on this point is the decisions of the federal courts of appeals, which have generally held that Title VIII does apply to discriminatory effect cases. These three subjects -- Title VIII's legislative history; analogous Supreme Court decisions; and

lower court decisions involving Title VIII -- are discussed in the next three sections. A final section is then devoted to "Analysis and Conclusions."

I. Legislative History and Congressional Intent

"[T]he starting point in every case involving construction of a statute is the language itself."[5] Title VIII, however, does not contain language that addresses the "intent vs. effect" issue. Therefore, it is necessary to resort to an examination of the congressional intent underlying the statute in an attempt to resolve this issue.

One source of evidence concerning congressional intent is legislative history. Unfortunately, the legislative history of Title VIII is not particularly helpful.[6] This is due in part to the fact that the statute was enacted after relatively short debates by the full House and Senate in the wake of the urban riots following the assassination of Martin Luther King, Jr. In addition, because Title VIII was first introduced as a floor amendment to a pending bill in the Senate, its legislative history does not include the committee reports and other documents that usually accompany major legislation.[7]

The specific issue of whether Title VIII was intended to bar practices with discriminatory effects as well as those based on intentional discrimination was not discussed by Congress. This is hardly surprising. Intentional discrimination was a way of life in the housing field, and eradicating it was obviously the key concern of the bill's sponsors. With the Supreme Court's decision in Griggs v. Duke Power Co.[8] still three years away, the "intent vs. effect" issue was simply not of commanding interest in 1968. As a result, there is no specific legislative history that can clearly resolve the question of whether Title VIII was meant to cover discriminatory effect cases.[9]

There is some evidence, however, concerning the broad impact that Title VIII was intended to have. Proponents of the statute in both the House and Senate spoke repeatedly of their desire to achieve the result of an integrated society through this legislation.[10] Title VIII begins with the sweeping declaration that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[11] Clearly, it is "within constitutional limitations" to outlaw practices with discriminatory effects. Indeed, Senator Mondale, the principal sponsor of Title VIII, in commenting on the role that government had played in maintaining segregated housing conditions, concluded that: "It thus seems only fair, and is constitutional, that Congress should now pass a fair housing act to undo the effects of these past State and Federal unconstitutionally discriminatory actions."[12]

The broad scope envisioned for Title VIII by its proponents has been recognized by the Supreme Court. In its first decision under the statute -- Trafficante v. Metropolitan Life Insurance Co. -- the Court held that Title VIII reflects "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution."[13] The Court's unanimous opinion commented that the language of the Fair Housing Act is "broad and inclusive," that the Act carries out a national "policy that Congress considered to be of the highest priority," and that vitality can be given to this policy "only by a generous construction" of the statute.[14] This mandate by a unanimous Supreme Court to construe Title VIII broadly has become the foundation for all subsequent judicial intrepretations of the Fair Housing Act.

In conclusion, the legislative history of Title VIII does not conclusively establish whether the law was intended to prohibit practices with discriminatory effects. Nothing in that history directly conflicts with this interpretation, however, and such an interpretation would be consistent with the broad mandate that clearly was intended for the statute by its proponents.

II. Supreme Court Decisions on the "Intent vs. Effect" Issue in Other Civil Rights Contexts

Although the Supreme Court has not yet decided whether Title VIII should be governed by an effect or an intent test, the Court has dealt with this issue in a number of cases involving other civil rights laws. This section describes some of these decisions and discusses how they might relate to a proper interpretation of Title VIII.

1) Griggs v. Duke Power Co., 401 U.S. 424 (1971).

In Griggs, the Supreme Court interpreted Title VII of the Civil Rights Act of 1964 to prohibit job requirements that produced racially discriminatory effects, as well as those that were prompted by a discriminatory intent. The Court unanimously held that Title VII bans employment practices that "operate to disqualify Negroes at a substantially higher rate than white applicants," unless the defendant can prove that such practices are "significantly related to successful job performance." 401 U.S. at 426. According to the Court, the statute was intended to proscribe "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." Id. at 431.

The plaintiffs in Griggs based their claim on §703(a) of Title VII, which makes it unlawful for an employer to discriminate against any individual "because of such individual's race." The Supreme Court did not specifically discuss the meaning of this phrase nor its legislative history. Rather, the opinion focused on the broad purposes underlying Title VII, concluding that the statute was intended "to achieve equality of employment opportunities and remove barriers that have operated in the past" to hurt minority employees. Id. at 429-430.

Certainly, similar objectives could be said to underlie the Fair Housing Act. In addition, Griggs was an interpretation of a statute that was passed only four years before Title VIII and that used almost the identical "because of race" language as Title VIII. These facts make Griggs the most important precedent affecting the "intent vs. effect" issue under the Fair Housing Act.

2) Washington v. Davis, 426 U.S. 229 (1976).

Here, the Supreme Court held that the equal protection guarantee of the United States Constitution could be violated only by a showing of purposeful discrimination. Like Griggs, this case challenged an employment test that disproportionately excluded minority candidates, but the plaintiffs' claim was based on the equal protection component of the 5th Amendment, not on Title VII. This distinction was critical for the Court, which held that purposeful discrimination was required to make out an equal protection claim.

The opinion made clear that the Griggs-effect standard would continue to govern Title VII cases. This standard, however, was thought to be too rigorous for constitutional claims, because it might call into question "a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." 426 U.S. at 248.

In areas like public employment and housing that are now covered by both a statute and the Constitution, the significance of Washington v. Davis is that the same practice may violate the statute even though it passes constitutional muster, because the statutory standard may involve "a more probing judicial review of, and less deference to" the defendant's conduct. Id. at 247.

3) Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977).

In Arlington Heights, the Supreme Court applied the principle of Washington v. Davis to a housing case, holding that an equal protection challenge to a municipality's exclusionary zoning decision would fail where only discriminatory effect was shown. The plaintiffs had sued under both Title VIII and the Equal Protection Clause, but only the constitutional claim was reviewed by the Supreme Court. The Court examined the evidence and concluded that the defendant's decision to block a subsidized housing development was not shown to have been motivated by a racial purpose. "This conclusion," wrote the Court, "ends the constitutional inquiry." The finding below that the defendant's action had a discriminatory effect "is without independent constitutional significance." 429 U.S. at 271.

Having disposed of the plaintiffs' constitutional claim, the Court then turned to the Title VIII claim. Noting that this claim had not been reviewed below, the Supreme Court remanded the case to the Seventh Circuit for consideration of the statutory claim. Ibid.

The Supreme Court's handling of the Title VIII claim in Arlington Heights suggests that the same dichotomy between constitutional and statutory standards that was recognized in Washington v. Davis for employment discrimination claims may also exist in the fair housing field. By remanding the Title VIII claim -- instead of simply dismissing it on the ground that it was controlled by the same standard as the equal protection claim -- the Court hinted that a standard other than purposeful discrimination would be appropriate in Title VIII cases. On remand, the Seventh Circuit took the hint and held that a violation of Title VIII "can be established by a showing of discriminatory effect without a showing of discriminatory intent."[18]

4) General Building Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375 (1982).

This case holds that 42 U.S.C. §1981 can be violated only by purposeful discrimination. Section 1981 provides for equal rights in making contracts and has been used in recent years primarily in employment discrimination cases. Section 1981 and its companion statute (42 U.S.C. §1982, which guarantees equal rights in property matters) were enacted as part of §1 of the Civil Rights Act of 1866. In General Building, the Supreme Court reviewed the post-Civil War legislative history of §1981 and concluded that the statute, which was a "legislative cousin[] of the Fourteenth Amendment," was intended to be governed by the same purposeful discrimination standard as the Equal Protection Clause. 458 U.S. at 389-391.

The Civil Rights Act of 1866 is important in the housing field. In Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), the Supreme Court interpreted §§1981-1982 to prohibit private, as well as public, racial discrimination in housing. Jones was decided within weeks of the enactment of Title VIII. Since 1968, therefore, both Title VIII and §§1981-1982 have been available to combat housing discrimination based on race.

In housing cases, the significance of General Building is that claims based on §1981 (and probably §1982[16]) now cannot be based on discriminatory effect. Title VIII claims, however, are not affected by General Building. It is well established that Title VIII and §§1981-1982 are independent of one another and that a limitation on one statute does not apply to the other.[17] It may well be, therefore, that the proper interpretation of Title VIII will include an effect test even though §§1981-1982 claims are now governed by General Building, just as the employment cases are subject to an effect test under Title VII and an intent test under §1981.

5) Guardians Association v. Civil Service Commission, N.Y.C., 463 U.S. 582 (1983).

In Guardians, the Justices produced no less than five separate opinions concerning the proper interpretation of Title VI of the Civil Rights Act of 1964. By various majority votes, the Court settled three issues having to do with the "intent vs. effect" question:

(a) proof of discriminatory intent is required for a violation of Title VI, itself. See 463 U.S. at 608 n.1.

(b) proof of discriminatory effect may be sufficient to establish a violation of the regulations promulgated pursuant to Title VI. See id. at 584 n.2.

(c) when a private plaintiff's Title VI claim is based on discriminatory effect, he can only be awarded injunctive, noncompensatory relief. See id. at 595-603; 610-611; and 612-615.

Because the Guardians decision was based on an assessment of the congressional intent underlying Title VI, it is not directly relevant to a proper interpretation of Title VIII. Guardians is worth noting, however, because it marks the first time that the Court has interpreted a modern civil rights statute to require a showing of purposeful discrimination. Thus, it can no longer be said that the Court will apply the intent standard only when the Equal Protection Clause or a post-Civil War statute from the Fourteenth Amendment era is involved. Guardians at least raises the possibility that the Court might conclude Title VIII should be governed by the purposeful discrimination standard.

Guardians also teaches that a statute may be accorded one interpretation (intent) when sued on directly and another

interpretation (effect) when suit is based on the statute's regulations. If applied to Title VIII today, this possibility would essentially mean adoption of the intent standard, because very few substantive regulations have thus far been promulgated under Title VIII.

6) Alexander v. Choate, 469 U.S. 287 (1985).

This handicap discrimination case was brought under §504 of the Rehabilitation Act of 1973. The Supreme Court's unanimous opinion took a middle ground on the "intent vs. effect" issue. The Court made clear that §504 did not outlaw all practices that produced discriminatory effects, but it also rejected the defendant's argument that only purposeful discrimination could violate the statute. Section 504 was assumed to reach "at least some conduct that has an unjustifiable disparate impact on the handicapped." 469 U.S. at 299.

Like Guardians, the Alexander opinion is not directly relevant to Title VIII, because it is based on the unique legislative history of §504. Still, Alexander is worth noting, because it marks the second time in recent years (Guardians being the first) that the Supreme Court has given a mixed answer to the question of whether the discriminatory effect standard is appropriate for a modern civil rights statute. In other words, the Justices have now discovered that the answer need not be a clear "Yes" or "No," but that a third alternative -- "Under some circumstances" -- is available. The Alexander opinion explained the appeal of such a mixed answer by noting that it would accommodate "two powerful but countervailing considerations -- the need to give effect to the statutory objectives [which favored an "effects" test] and the desire to keep §504 within manageable bounds [which counseled against an "effects" test]." Id. at 299. As a result of Alexander and Guardians, the "under some circumstances" alternative must be considered at least a possibility when the Court reviews the "intent vs. effect" issue under Title VIII.

III. Decisions of the Federal Courts of Appeals on Discriminatory Effect in Title VIII Cases

This section reviews 16 major appellate court decisions on discriminatory effect under Title VIII. A brief description of each

case is given, starting with the oldest decision and progressing chronologically. An analysis of the entire group of cases is presented in Part IV. The principal conclusion of this analysis is that these decisions, though not in agreement on all points, do reflect a strong consensus that a Title VIII violation may be based on discriminatory effect as well as on discriminatory intent.

1) United States v. Pelzer Realty Company, Inc., 484 F.2d 438 (5th Cir. 1973), cert. denied, 416 U.S. 936 (1974). Here, the old Fifth Circuit upheld a "pattern or practice" suit by the Justice Department under §3604(a) and §3604(b). There was strong evidence of the defendant's intentional discrimination, but the opinion also stated that "it is not necessary to show that [defendant] intended to deprive [black homeseekers] of rights granted by the Act. A violation occurred because his words had that effect." 484 F.2d at 443.

2) United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, 493 F.2d 499 (5th Cir. 1974). In this exclusionary zoning suit based on §3604(a), §3604(b), §§1981-1982, and the Equal Protection Clause, the Fifth Circuit held that "the effect of [defendants'] refusal was racially discriminatory. To prove a prima facie case of racial discrimination, no more is required." 493 F.2d at 808. Subsequent Supreme Court decisions have discredited this holding insofar as it applies to §§1981-1982 and the Equal Protection Clause (see Part II supra, discussing General Contractors and Washington v. Davis). However, the United Farmworkers case must still be considered a precedent, albeit a somewhat tarnished one, on the proper meaning of Title VIII.

3) Williams v. Matthews Company, 499 F.2d 819 (8th Cir.), cert. denied, 419 U.S. 1021 (1974). This case was brought under §3604(a), §3604(b), and §1982, and again included substantial evidence of the defendant's intent to discriminate. In ruling for the plaintiff, the Eighth Circuit wrote that:

> The courts will look beyond the form of a transaction to its substance and proscribe practices which actually or predictively result in racial discrimination, irrespective of defendant's motivation.

499 F.2d at 826.

4) Boyd v. Lefrak Organization, 509 F.2d 1110 (2d Cir.), cert. denied, 423 U.S. 896 (1975). Here, the Second Circuit in a 2-1 decision refused to apply Griggs to a Title VIII-§1982 case. The plaintiffs were a class of welfare recipients who could not meet the defendant's requirement that its tenants have a weekly income equal to at least 90% of their monthly rent. This requirement was not shown to have been racially motivated, and the minority population in the defendant's apartments (19.8%) was not far below what it was in the overall metropolitan area. The plaintiffs challenged the 90% rule on the grounds that it excluded most welfare recipients (at least 77% of whom were minorities) and that blacks were disqualified by the rule at a substantially higher rate than whites. In ruling for the defendant, the majority opinion held that this showing of disproportionate impact was not sufficient to shift a burden of justification to a private business defendant in fair housing cases. 509 F.2d at 1113. According to Boyd, the Griggs-Title VII approach was "inapposite" in such cases. Id. at 1114. At the time, this decision seemed to be a fairly clear statement that Title VIII cases in the Second Circuit were not to be governed by a discriminatory effect standard, but five years later, the same court rejected this view of Boyd and endorsed the effect theory in Robinson v. 12 Lofts Realty, Inc. (see Case #11 infra).

5) United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975). This exclusionary zoning suit was brought by the Justice Department under §3604(a) and §3617. With respect to the proper standard under Title VIII, the Eighth Circuit wrote:

> To establish a prima facie case of racial discrimination, the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect. . . . The plaintiff need make no showing whatsoever that the action resulting in racial discrimination in housing was racially motivated.

508 F.2d at 1184-1185. Once a showing of discriminatory effect has been made by the plaintiff, Black Jack held that "the burden shifts to the government defendant to demonstrate that its conduct was necessary to promote a compelling governmental interest." Id. at 1185.

6) Smith v. Anchor Building Corp., 536 F.2d 231 (8th Cir. 1976), and
7) Wharton v. Knefel, 562 F.2d 550 (8th Cir. 1977).

Both of these cases were based on Title VIII and §1982, and both included substantial evidence of the defendant's racial motivation. Still, the Eighth Circuit felt compelled to state that effect, not motivation, was to be the "touchstone" in such cases. See Smith, 536 F.2d at 233, and Wharton, 562 F.2d at 555.

8) Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978). In this exclusionary zoning suit, the Supreme Court ruled that the plaintiffs' equal protection claim failed for lack of proof of purposeful discrimination and then remanded the case to the Seventh Circuit for consideration of the plaintiffs' Title VIII claims (see Part II supra for a discussion of the Supreme Court's decision). On remand, the court of appeals held that "at least under some circumstances a violation of §3604(a) can be established by a showing of discriminatory effect without a showing of discriminatory intent." 558 F.2d at 1290. The Seventh Circuit cautioned, however, that not "every action which produces discriminatory effects is illegal." Ibid. The opinion went on to list four "critical factors" that a court should examine in determining whether a violation of §3604(a) has occurred:

> (1) how strong is the plaintiff's showing of discriminatory effect;
>
> (2) is there some evidence of discriminatory intent, even though it is not enough to make out an equal protection violation;
>
> (3) what is the defendant's interest in taking the action complained of; and,
>
> (4) does the plaintiff seek affirmative remedies or merely to restrain the defendant from interfering with individual property owners who wish to provide housing opportunities.

Ibid. The Seventh Circuit analyzed these factors and concluded that

this was a "close case" that required further fact-finding at the trial court level. Id. at 1293-1294. After the case was sent back to the district court, the parties reached a settlement.[9]

9) Joseph Skillken & Co. v. City of Toledo, 528 F.2d 867 (6th Cir. 1975), vacated and remanded, 429 U.S. 1068, decision adhered to, 558 F.2d 350 (6th Cir.), cert. denied, 434 U.S. 985 (1977). This exclusionary zoning suit had a number of factual similarities to Arlington Heights, but the Sixth Circuit took a much different approach to the law. In its first decision, the court found no purposeful discrimination on the part of the defendants and ruled in their favor, not bothering to distinguish between the plaintiffs' Title VIII claim and their equal protection claim. While the plaintiffs were seeking certiorari, the Supreme Court decided Arlington Heights, which confirmed the Sixth Circuit's view that purposeful discrimination was required under the Equal Protection Clause but which left the Title VIII standard unresolved (see Part II, Case #3, supra). The Supreme Court then vacated the Sixth Circuit's decison in Skillken and remanded the case for reconsideration in light of Arlington Heights. The hint implicit in this remand -- that Title VIII might have a different standard from the Equal Protection Clause -- was lost on the Sixth Circuit. In a brief opinion, it simply adhered to its prior determination that the defendants should win, again failing to treat the Title VIII claim separately from the equal protection claim. For some years, this remand decision was read by some observors as a conscious rejection by the Sixth Circuit of the discriminatory effect theory under Title VIII. In subsequent opinions, however, this court has made clear that Skillken was not an authoritative interpretation of Title VIII (see United States v. City of Parma, Ohio (Case #12 infra)), and that in fact the Sixth Circuit does endorse the effect theory in Title VIII cases (see Arthur v. City of Toledo, Ohio (Case #16 infra)).

10) Resident Advisory Board v. Rizzo, 564 F.2d 126 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978). In this exclusionary land-use case, the Third Circuit examined Title VIII's legislative history in

some detail and held that §3604(a) could be violated by a showing that the defendant's action had a racially discriminatory effect. 564 F.2d at 146-148. The opinion then discussed the nature of the burden that would shift to the defendant once the plaintiff establishes a prima facie case based on discriminatory effect. According to Rizzo, a defendant in these circumstances must show a justification for his action that serves a legitimate, bona fide interest, and he must also show that "no alternative course of action could be adopted that would enable that interest to be served with less discriminatroy impact." Id. at 149. Because the defendants in Rizzo failed to satisfy this burden, the Third Circuit held that they had violated Title VIII.

11) Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032 (2d Cir. 1979). In this Title VIII-§1982 case, the Second Circuit found the evidence sufficient to establish the defendant's racial motive, but it also endorsed the discriminatory effect theory for purposes of §3604(a). The opinion is significant, because it explicitly holds that an earlier Second Circuit decision -- Boyd v. Lefrak Organization (Case #4 supra) -- is not inconsistent with this view. The Robinson opinion read Boyd as concluding only that the plaintiffs there had failed to show racial motivation, a conclusion that "does not imply that proof of motivation was required in order for the plaintiffs to establish a prima facie case." 610 F.2d at 1038 n.10.

NOTE: Subsequent district court opinions from the Second Circuit have cited Robinson for the proposition that a prima facie case under Title VIII may be established based on discriminatory effect. E.g., Faris v. Coleman, P-H: Fair Housing--Fair Lending Rptr. ¶15,519, at p. 16,422 (D. Conn. 1985); United States v. Yonkers Board of Education, 624 F. Supp. 1276, 1292 n.11 (S.D.N.Y. 1985).

12) United States v. City of Parma, Ohio, 661 F.2d 562 (6th Cir. 1981), cert. denied, 456 U.S. 926 (1982). Here, the Sixth Circuit reviewed a trial court decision that had found violations of §3604(a) and §3617 based on actions by Parma that had both the purpose and effect of maintaining segregation in the city. The opinion below had specifically endorsed the discriminatory effect theory for such Title

VIII cases. See 494 F. Supp. 1049, 1054-1055 (N.D. Ohio 1980). On appeal, the defendants argued that this view was inconsistent with the Sixth Circuit's earlier decision in Skillken (Case #9 supra). The Parma panel rejected this argument. It stated that Skillken was not based "on a contruction of Title VIII. In fact, the Fair Housing Act is not mentioned in any of the dispositive language of the opinion." 661 F.2d at 574. Having disposed of Skillken, the Sixth Circuit in Parma went on to affirm the finding that the city had engaged in illegal discrimination and, with some modifications, also affirmed the broad remedial order entered by the district court. The Parma opinion does not contain a ringing endorsement of the effect theory, but it does serve to undercut whatever precedential value Skillken may have had as a threat to that theory. It remained for a later case -- Arthur v. City of Toledo, Ohio (Case #16 infra) -- to establish the Sixth Circuit's clear acceptance of the discriminatory effect theory in Title VIII cases.

13) Halet v. Wend Investment Co., 672 F.2d 1305 (9th Cir. 1982). Here, the plaintiff challenged an apartment complex's "no children" policy on the ground that it would exclude a greater percentage of minority families than white families. The Ninth Circuit held that this claim stated a cause of action under §3604, concluding that: "Significant discriminatory effects flowing from rental decisons may be sufficient to demonstrate a violation of the Fair Housing Act." 672 F.2d at 1311. The case was remanded for a trial on the merits.

NOTE: For a post-Halet decision by a district court from the Ninth Circuit finding a Title VIII violation based on proof of discriminatory effect, see Keith v. Volpe, 618 F. Supp. 1132, 1147-1157 (C.D. Cal. 1985).

14) Smith v. Town of Clarkton, N.C., 682 F.2d 1055 (4th Cir. 1982). In this exclusionary land-use case, the Fourth Circuit held that practices with discriminatory effects could violate §3604. The opinion adopted the "four factor" approach to analyzing these cases developed by the Seventh Circuit in its remand decision in Arlington Heights (see Case #8 supra). The result of this analysis in Town of Clarkton led to a holding that the defendants had violated Title

VIII, although the Fourth Circuit noted that the evidence of the defendants' discriminatory intent was so strong that they would have been liable "under either the 'discriminatory effect' test or one requiring the showing of discriminatory intent." 682 F.2d at 1067.

15) Betsey v. Turtle Creek Associates, 736 F.2d 983 (4th Cir. 1984). Here, the Fourth Circuit held that a landlord's policy of evicting families with children had such a large disproportionate impact on black tenants that the policy would violate Title VIII, unless the defendant could justify it by a showing of "business necessity." Betsey was a "pure" discriminatory effect case. The trial court had found that the defendant's policy was not based on discriminatory intent, and the plaintiffs did not challenge this ruling in the court of appeals. The proof showed that the defendant's new "all-adult" policy resulted in 74.9% of the nonwhite tenants receiving eviction notices, while only 26.4% of the white tenants received such notices. The Fourth Circuit held that such statistics were sufficient to establish a prima facie case of discriminatory impact under Title VIII. 736 F.2d at 988.

Once such a showing is made, the court of appeals ruled that the burden shifts to the defendant to "prove a business necessity sufficiently compelling to justify the challenged practice [citing Griggs]." Ibid. According to Betsey, the proper analysis of this stage of an effect case under Title VIII varies depending on whether the defendant is a private entity or a public body. In private defendant cases, the Griggs "business necessity" test is appropriate, whereas cases against municipal defendants should employ the "four factor" analysis adopted in the Town of Clarkton case (see Case #14 supra). Id. at 988 n.5.

16) Arthur v. City of Toledo, Ohio, 782 F.2d 565 (6th Cir. 1986). Here, the Sixth Circuit endorsed the discriminatory effect theory in in a decision that rejected the plaintiffs' challenge to two referendum votes blocking low-income housing. The opinion agreed with the various other courts of appeals that have held that "at least under some circumstances a violation of [the Fair Housing Act]

can be established by a showing of discriminatory effect without a showing of discriminatory intent." 782 F.2d at 574. The approach to these cases adopted in Arthur was a modified version of the "four factor" analysis developed by the Seventh Circuit in its remand decision in Arlington Heights (see Case #8 supra). The Sixth Circuit decided to adopt three of these four factors, choosing not to consider Factor #2 (evidence of the defendant's intent). Id. at 575. Applying this version of the effect test to the case at hand, the court of appeals held that the challenged referenda did not have a sufficient racial impact to violate Title VIII. Id. at 575-577.

IV. Analysis and Conclusions

The issue of whether Title VIII bans practices with discriminatory effects as well as those based on discriminatory intent must still be considered unresolved. The language of the statute is silent on this matter. The legislative history, though supportive of a broad reading of the law, is not conclusive. The Supreme Court has shown a willingness to interpret Title VIII broadly, but has thus far denied all requests to review the effect theory under the statute. In other civil rights areas, the Court has often spoken on the "intent vs. effect" issue, but these decisions show too much variety to support a confident prediction as to the Court's eventual approach to Title VIII. The most persuasive of these precedents -- Griggs -- supports the effect theory, but more recent decisions suggest that the Court may now be favoring a more mixed ("under some circumstances") answer to the effect question.

Decisions of the federal courts of appeals are currently the principal source of authority on this issue. These decisions are reviewed in Part III. They reflect a strong consensus -- now approaching unanimity -- that Title VIII should be construed to prohibit discriminatory effects, at least "under some circumstances."

The Circuits that led the way in endorsing this view were the Third (see Part III, Case #10), the Fifth (Cases #1 and #2), the Seventh (Case #8), and the Eighth (Cases #3, #5, #6, and #7). The

Fourth (Cases #14 and #15) and the Ninth (#13) joined this group in the 1980s. The Second and the Sixth, after initial false starts (Cases #4 and #9), have now indicated their agreement (Cases #11, #12, and #16). The new Eleventh has no case of its own, but its announced policy of following the precedents of the old Fifth[*] puts it in the pro-effect group (Cases #1 and #2). Only the First, Tenth, and D.C. Circuits have not been heard from on this issue. Not a single court of appeals currently espouses the view that the effect theory is inappropriate for Title VIII cases.

Despite this consensus on the basic issue, there is a good deal of variety reflected in the court of appeals cases. First of all, many of the appellate decisions adopting the discriminatory effect theory involved defendants who were also shown to have engaged in intentional discrimination. Examples include Cases #1, #3, #6, #7, #11, and #14. Discriminatory effect and discriminatory intent are certainly not incompatible concepts, and a fair housing plaintiff may well pursue both theories in a single case. The endorsement of the discriminatory effect theory in these cases, however, may be viewed as having somewhat less precedential value than it would in cases where only proof of discriminatory effect was presented.

Second, it should be noted that there are in fact two different types of discriminatory effect cases under Title VIII. Historically, the more common type has involved exclusionary zoning or some other community-wide practice that is challenged on the ground that it perpetuates housing segregation in an entire area. No less than 8 of the decisions reviewed in Part III are of this variety (see Cases #2, #5, #8, #9, #10, #12, #14, #16). The other type of effect case challenges a housing practice because it has a greater adverse impact on minorities than on whites. This "disproportionate impact" type of discriminatory effect case has been well known in the employment discrimination field ever since Griggs,[80] but it has been less common in Title VIII cases. An example of this type of effect case in the housing field is Case #15, Betsey v. Turtle Creek Associates.

Third, most of the lower court decisions that have applied the discriminatory effect theory in Title VIII cases have been based on only one provision of the statute: §3604(a). The rest have involved §3604(b). There is no case law on the effect issue in cases based exclusively on §3604(c), §3604(d), §3604(e), §3605, or §3606. The point is that each section of Title VIII may have to be examined on its own with respect to the "intent vs. effect" issue instead of reaching an overall conclusion for the statute as a whole.

Fourth, endorsement of the effect theory certainly does not mean that the defendant will always lose. Many of the lower courts have required the plaintiff to prove a "significant" discriminatory effect in order to benefit from this theory and have gone on to rule that the plaintiff's proof failed to meet this burden.[81] If the plaintiff does prove a large enough discriminatory effect, the result is not an automatic victory. Rather, such a showing merely shifts the burden of proof to the defendant to justify his challenged practice on some non-discriminatory ground. The proper standard for evaluating the defendant's justification has caused some disagreement among the circuits (compare Cases #5, #8, #10, and #15), but, whatever the standard, the key point is that a defendant with a substantial justification for his policy can win a Title VIII effect case.

A final point should be noted. Whether or not the effect theory is adopted for purposes of Title VIII has simply not been a major issue in the fair housing field, at least in terms of the number of cases affected by it. The vast majority of Title VIII cases have been based exclusively on proof of the defendant's discriminatory intent. No doubt, this will continue in the future. As to those relatively few cases where the effect theory has been discussed, most would have reached the same result with or without the effect theory (i.e., either the defendant won or, if the plaintiff won, he would have won anyway based on proof of discriminatory intent). Of the 16 cases reviewed in Part III, only two (#8 and #15) probably would have been decided differently in the absence of the discriminatory effect

theory. This is not to say that the "intent vs. effect" issue is a trivial one. In certain types of large cases, it can be very important. And the "symbolic" value of giving Title VIII at least as generous an interpretation as Title VII has been accorded should not be overlooked. The fact remains, however, that the decision in most fair housing cases will not be changed by the resolution of the issue discussed in this paper.

FOOTNOTES

[1] 42 U.S.C. §§3601 et seq.

[2] I have previously addressed this issue in Schwemm, "Discriminatory Effect and the Fair Housing Act," 54 Notre Dame Lawyer 199 (1978). Other relevant writings include: Comment, "A Last Stand on Arlington Heights: Title VIII and the Requirement of Discriminatory Intent," 53 N.Y.U. L. Rev. 150 (1978); Note, "Justifying A Discriminatory Effect Under the Fair Housing Act: A Search for the Proper Standard," 27 U.C.L.A. L. Rev. 398 (1979); and four papers prepared by, respectively, John O. Calmore, Marshall D. Stein, Otto J. Hetzel, and Douglas W. Kmiec for a consultation-hearing of the U.S. Commission on Civil Rights in 1985 (Issues in Housing Discrimination: A Consultation/Hearing, Vol. 1, 77-142 (U.S. Commission on Civil Rights, November 12-13, 1985)).

[3] 42 U.S.C. §3602(f).

[4] The phrase "because of" is used in §3604(a), §3604(b), §3604(d), and §3605; §3604(c) is directed toward discrimination "based on" race and other prohibited grounds; and §3606 uses the words "on account of."

[5] Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322, 330 (1978), quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring).

[6] The relevant legislative history of Title VIII is reviewed in Schwemm, "Discriminatory Effect and the Fair Housing Act," 54 Notre Dame Lawyer 199, 207-212 (1978).

[7] The floor amendment that eventually became Title VIII was sponsored by Senators Mondale and Brooke. Hearings on a proposal similar to the Mondale-Brooke amendment had been held by the Housing and Urban Affairs Subcommittee of the Senate Banking and Currency Committee in August, 1967, but no bill had been reported as a result of these hearings.

[8] 401 U.S. 424 (1971). The Griggs decision is discussed in Part II (Case #1) of this paper.

[9] A paper by Marshall D. Stein published in 1985 by the U.S. Commission on Civil Rights argues, to the contrary, that the legislative history of Title VIII demonstrates that the statute was intended to be governed solely by a discriminatory intent standard. See Stein, "The Fair Housing Act of 1968 and the Civil Right Act of 1866: The Test for Liability in Housing Discrimination Cases," Issues in Housing Discrimination: A Consultation/Hearing, Vol. 1, 94-114 (U.S. Commission on Civil Rights, November 12-13, 1985). This paper represents a minority view and is, on close analysis, not convincing. For an effective rebuttal of the Stein paper, see Hetzel, "A Perspective on Legal Issues in Housing Discrimination," Issues in Housing Discrimination: A Consultation/Hearing, Vol. 1, 116-120 (U.S. Commission on Civil Rights, November 12-13, 1985).

[10] See Schwemm, supra note 6, at 210-211.

[11] 42 U.S.C. §3601.

[12] 114 Cong. Rec. 2699 (1968).

[13] 409 U.S. 205, 209 (1972).

[14] Id. at 209, 211, 212.

[15] 558 F.2d 1283, 1290 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978). This decision is discussed in Part III (Case #8) of this paper.

[16] Even though General Building dealt only with §1981, that statute and §1982 are generally "construed in a similar fashion." Atkins v. Robinson, 545 F. Supp. 852, 880 (E.D. Va. 1982), aff'd, 733 F.2d 318 (4th Cir. 1984). After General Building, most lower courts have taken the position that §1982 is also to be governed by the discriminatory intent standard. E.g., Hamilton v. Svatik, 779 F.2d 383, 387 (7th Cir. 1985); Phillips v. Hunter Trails Community Ass'n, 685 F.2d 184, 187 (7th Cir. 1982); In re Malone, 592 F. Supp. 1135, 1158-1159 (E.D. Mo. 1984).

[17] E.g., DiFilippo v. Morizio, 759 F.2d 231, 233-234 n.1 (2d Cir. 1985); Marable v. Walker, 704 F.2d 1219, 1221 (11th Cir. 1983); Bills v. Hodges, 628 F.2d 844, 845 n.1 (10th Cir. 1980); Morris v. Cizel, 503 F.2d 1303 (7th Cir. 1974); see generally Jones v. Alfred H. Mayer Co., 392 U.S. 409, 416-417 (1968).

[18] See 469 F. Supp. 836 (N.D. Ill. 1979), aff'd, 616 F.2d 1006 (7th Cir. 1980).

[19] See Bonner v. City of Prichard, Alabama, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

[20] Griggs v. Duke Power Co., 401 U.S. 424 (1971). The Supreme Court's decision in Griggs is discussed in Part II (Case #1) of this paper.

[21] See, e.g., Southend Neighborhood Improvement v. County of St. Clair, 743 F.2d 1207, 1209 (7th Cir. 1984); In re Malone, 592 F. Supp. 1135, 1167 (E.D. Mo. 1984); Schmidt v. Boston Housing Authority, 505 F. Supp. 988, 994-996 (D. Mass. 1981).

Senator SIMON. Thank you. Professor Schwemm, I know that my staff has the book that you have authored here: "Housing Discrimination Law," along with "The Housing Discrimination Law Supplement."

You described the law as not a terribly strong one, and you say that it is now imbalanced against the victim. Is what we have proposed here a reasonably balanced law?

Mr. SCHWEMM. I think if you are talking about an individual lawsuit, sir, the current law is not unfair to the victim who can afford legal counsel, which quite often is terribly expensive, and who has the time to engage in litigation. And you have to understand that the moment of being discriminated against in housing is not the time most individuals want to stop their life and engage in Federal litigation.

What this bill does, I believe, is say that the Nation as a whole is no longer going to rely almost exclusively on those individuals to enforce fair housing. A number of them have done so, by the way. Their efforts have been somewhat successful on an individual basis, but nationwide the enforcement effort has been not strong.

What this bill does through the administrative law judge technique is to say that if you file a complaint, there will be Federal help for that. The complaint can be processed; the case can be prosecuted; the structure of the Federal Government is available to help you enforce your rights.

And I might say one additional thing as a result of my experience on the Kentucky Human Rights Commission. The importance of having that effective procedure in place is not only how it is going to deal with the cases that actually come to hearing, but it is also going to encourage respondents to obey the law and take that process seriously before the hearing. Many cases will be settled. In our own experience in Kentucky we find, since we do have substantial cease and desist power and other power with respect to remedies, that a large number of cases never get to the hearing process; that the respondents see what is coming and they agree to settle in an appropriate fashion. You do not have that now because the respondents well understand that the HUD procedures have no teeth in them whatsoever.

Senator SIMON. Ms. Milstein, we talk about 36 million Americans being handicapped, but many of them may, for example, walk with a limp but may not be dramatically affected by the discrimination in housing.

Could you make any kind of a guess as to what are the numbers of Americans who face discrimination in housing because of disabilities?

Ms. MILSTEIN. I am not prepared to give you those figures today, Senator.

I would say simply, though, that you prefaced your question with a reference to people who have visible physical disabilities, and I suspect that you are quite right, that the numbers of people who have such serious physical disabilities that they need the kinds of accommodations that an earlier witness referenced today is a much smaller number than 36 million people.

On the other hand, the Congress very wisely included in the definition, as you are including, those having a history of a handicap

or being regarded as having a handicap. That handicap is described as substantially impairing a major life function.

Thus, when a landlord or an employer or an educator knows an individual has tested positive for tuberculosis, and wrongly assumes that that person has active tuberculosis and, therefore, denies that person the house or the benefit of the education program or the job, then that person is being discriminated on the basis of a perceived disability.

That vastly expands the numbers about whom we are talking.

Senator SIMON. So that even though the number of people who may be discriminated against may not be 36 million, in fact we are really talking about millions of Americans.

Ms. MILSTEIN. That is right.

Senator SIMON. Millions of Americans face this problem, not just a handful.

Ms. MILSTEIN. That is right, Senator.

Senator SIMON. Senator Kennedy.

Senator KENNEDY. Let me ask Professor Schwemm: There are those who say we should not pass this needed legislation until we address the issue they call "integration maintenance." Based on your knowledge of the law of housing, how would you respond to this position?

Mr. SCHWEMM. Well, sir, if this entire hearing room were the problem of housing discrimination in this country, then my small pen here would be the problem of integration maintenance. I want you to address the problem of housing discrimination in this country, and keep your eye on the major problem and do not be deflected by what turns out to be a fairly minor, in terms of number of situations involved, problem that the courts under title VIII are perfectly capable of dealing with if we ever get to a situation where litigation is involved.

There are, frankly, sir, more Law Review articles on this subject and more speeches on this subject than there are cases. My knowledge of it is that there are less cases than there are fingers on one hand. And when the cases do come, the courts are perfectly capable of dealing with it.

I have heard it said that some people argue they cannot understand the law. They are caught between a rock and a hard place. It is just not so, sir. They can understand the law. They can follow the law, and the law makes perfectly good sense, I believe.

Senator KENNEDY. There are some that say that we should not pass legislation until we address the issue of whether an intent test or effects test should govern housing discrimination. You made some reference to that in your opening comment. Would you develop that? Describe for the committee the state of the law in this area.

Mr. SCHWEMM. Yes, sir. Again, I think this is an area where title VIII, as it is currently written, is evolving in a correct fashion and does not need to be addressed in the amendments bill. The amendments bill is addressing problems that need to be addressed. This is not a problem area, and it does not need to be addressed.

For the 19 or so years since the 1968 act, there have been a few cases that have presented this issue. They have worked their way up to the Court of Appeals level. The Court of Appeals of the

United States have worked on this issue with some variety and subtleties, but in general a unanimity of approach that I think has probably been the reason that the U.S. Supreme Court has decided to deny certiorari in all of these cases.

It seems to me if you want to reach any conclusion from a denial of certiorari—and that is, of course, dangerous to do—but it may be that the U.S. Supreme Court has decided this issue is not necessary to review, because the Courts of Appeals are solving it.

If I had longer, I would be happy to go into a lengthy description. I do some of this in the paper about how there are some subtle differences in the case law with respect to the individual circuits, but they are working that out in the normal process. I think we should let them continue to work that out.

Senator KENNEDY. Ms. Milstein, you have given us important testimony with regards to the provisions in the legislation dealing with the handicap. Is it your sense that a great many, I think, red herrings have been raised about this issue about whether we are going to require various landlords to take in drug addicts and alcoholics?

Your testimony, particularly the paragraph of your testimony, was quite clear on this issue. Would you just state it once more about how we are going to distinguish between what is impermissible discrimination on the basis of handicapped and how we are going to sift out those cases which obviously we intend to sift out?

What would be the test? How would you define it in terms of that particular provision of the legislation?

Ms. MILSTEIN. Well, Senator, in the context of housing, unlike other contexts, the test is created by the landlord himself in a rental agreement. Rental agreements traditionally call for certain types of behavior on behalf of tenants. One has to be able to pay the rent; one has to be able to keep the apartment in a decent, safe and sanitary manner; one has to be able to live in such a way as to not interfere with his or her neighbors' enjoyment of their property.

The definition of handicap that this bill would include—and, in fact, the intent to cover people with disabilities under the Fair Housing Act—simply says to landlords and to homeowners:

> You may not discriminate against an applicant for housing or a renter because that person has a disability. You are a landlord. That person is a renter. Your relationship with him is guided by the contract that both of you signed, or that you might sign.

And that is it. Those are the issues that are involved.

If, for example, someone rents an apartment, after having looked for many months because there are so few rental apartments now available, and goes out to celebrate, goes to a bar, is drinking a beer, and the landlady who has just rented him an apartment sees him drinking assumes that he is an alcoholic and wants to break the contract, she would be discriminating against that person because of her perception that he was an alcoholic and not because of any objective data that would lead to a rational decision as to whether that person would be a good tenant or not.

The Fair Housing Act's coverage of people with disabilities is really a very straightforward restatement of what this Congress and the courts have already said for the past many years, which is

that we will not countenance discrimination because discrimination is not the fault of the victim, because of the victim's color or the victim's disability; it is the fault of those who insist on operating on the basis of unfounded, irrational generalizations.

Senator KENNEDY. OK. That is very, very helpful.

Thank you very much, Mr. Chairman.

Senator SIMON. I thank both of you, as well as the earlier witnesses, for their testimony and I want to thank Senator Kennedy again for coming in and pinch-hitting for me.

The hearing stands adjourned.

[Whereupon, at 11:15 a.m., the subcommittee was adjourned.]

FAIR HOUSING AMENDMENTS ACT OF 1987

TUESDAY, JUNE 9, 1987

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:21 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Paul Simon (chairman of the subcommittee) presiding.

Also present: Senators Thurmond, DeConcini, Kennedy, and Specter.

Staff present: Deborah Leavy, chief counsel; Jeffrey Robinson, minority chief counsel; Cheryl G. Matcho, chief clerk; Margaret Morton, legislative fellow.

OPENING STATEMENT OF SENATOR PAUL SIMON

Senator SIMON. The subcommittee hearing will come to order.

First of all, my apologies to my colleagues, Senator Kennedy and Senator Thurmond, and to witnesses for getting here late.

There is no issue that is really more fundamental than the ability to fulfill the American dream by having that home. When that opportunity, for whatever reason, is denied to people, we are impinging on that American dream in ways that are contrary to the best interests and ideas of this country. What we want to do is to make sure that that American dream can be and is a reality for people. That is ultimately what this legislation is all about.

We appreciate the witnesses being here. We set this hearing specifically so that Brad Reynolds, the Assistant Attorney General, could be here. He is not able to be here. We will reschedule for him, but, frankly, we are not going to postpone action on this matter indefinitely as a result of delays from some witnesses. We want to move ahead and get action on this legislation.

Let me call on my colleagues for any opening statements they may have.

Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman. Mr. Chairman, this morning the subcommittee—suppose you let DeConcini go next. Let me clear my throat.

Senator SIMON. All right.

Senator Kennedy.

OPENING STATEMENT OF SENATOR KENNEDY

Senator KENNEDY. Mr. Chairman, I want to thank you very much for having this hearing this morning. It is time to put to rest once and for all any suggestion that there is any constitutional infirmity in the administrative enforcement procedure in the Kennedy-Specter bill.

The Supreme Court's precedents are clear. The seventh amendment does not prevent Congress from establishing administrative tribunals to hear enforcement actions brought by the government under Federal statutes.

Those who would put the Supreme Court's recent decision in the *Tull* case as support for the contrary view are simply mistaken. The Tull court clearly and unambiguously reaffirmed the well-established rule that, and I quote, "The Seventh Amendment is not applicable to administrative proceedings." The Court could not have been clearer. The *Tull* decision supports the constitutionality of the enforcement mechanism in the Kennedy-Specter bill, and those within the administration who genuinely support the effort to strengthen the fair housing laws have acknowledged as much.

At this time, Mr. Chairman, I would like to place in the record a letter dated May 7, 1987, from the General Counsel of the Department of Housing and Urban Development, Michael Dorsey, to William Bradford Reynolds, the Assistant Attorney General for Civil Rights.

[Information supplied for the record follows:]

June 2, 1987

Honorable Edward M. Kennedy
United States Senate
Washington, D. C. 20510

Dear Senator Kennedy:

I am responding to your letter of May 21, 1987 to Secretary Pierce, who is out of the country, requesting that you be provided with any documents prepared by the Department of Housing and Urban Development assessing the impact of the recent Supreme Court decision in Tull v. U.S., 55 U.S.L.W. 4571 (April 28, 1987), on administrative enforcement mechanisms proposed for use in the Federal Fair Housing Law.

In order to assist you in your efforts to review the Tull decision and its impact in the area of fair housing, I am enclosing a copy of my May 7, 1987 letter to the Assistant Attorney General Counsel for Civil Rights with my analysis of this case.

I hope this material will be helpful to you in the development of a legislative proposal to strengthen the enforcement mechanism provided in the Federal Fair Housing Law. Please let me know if I can be of further assistance.

Very sincerely yours,

J. Michael Dorsey

Enclosure

May 7, 1987

William Bradford Reynolds
Assistant Attorney General
for Civil Rights
Department of Justice
Washington, D.C. 20530

Re: Fair Housing Amendments

Dear Mr. Reynolds:

We have read with particular interest the Supreme Court decision last week in Tull v. United States, decided April 28, 1987, 55 USLW 4571. (April 28, 1987)

In this case the Supreme Court holds that the Seventh Amendment to the Constitution guarantees the right to a jury trial in a civil action in which statutorily provided civil penalties have been sought.

While this decision relates to the assessment of civil penalties through the Federal courts rather than through Federal administrative procedures, we believe there is dicta in this decision which tends to indicate that the Supreme Court would not find a Congressional delegation of authority to an administrative tribunal to award civil penalties and punitive damages to present the same Constitutional question.

Specifically, the Court in Tull indicated that it had:

> ". . . considered the practical limitation of a jury trial and its functional capability with proceedings outside of traditional courts of law in holding that the Seventh Amendment is not applicable to administrative proceedings. See e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Commission, 430 U.S. 452, 454 (1977); Pernell v. Southall Realty, 416 U.S. 363, 383 (1974)" Id; Footnote 4

The Court, in upholding the award of civil penalties in an administrative proceeding in Atlas Roofing, held:

> ". . . that when Congress creates new statutory 'public rights', it may assign their adjudication to an administrative agency with

> which a jury trial would be incompatible without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law.' . . . This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law instead of an administrative agency." Id; at 455 (footnote omitted.)

It is also relevant that the Court's holding in Atlas Roofing was based in large part on the Court's interpretation of its decision in NLRB v. Jones and Laughlin Steel Company, 301 U.S. 1 (1937), contained in Curtis v. Loether, 415 U.S. 189 (1974), a Title VIII Fair Housing Act case, where the Court concluded that the Jones and Laughlin case upheld the power of Congress to "entrust enforcement of statutory rights to an administrative process . . . free from the strictures of the Seventh Amendment." 415 U.S. 189, 194-195 (1974). Id; at 454

Based on this analysis, we believe that the Tull decision can provide support for the position that Congress can assign the adjudication of fair housing cases and the award of civil penalties and punitive damages to an administrative tribunal.

Sincerely yours,

J. Michael Dorsey

Senator KENNEDY. In that letter, Mr. Dorsey analyzes the impact of the *Tull* decision on pending fair housing legislation, and based on that analysis Mr. Dorsey states, and I quote, "We believe that the *Tull* decision can provide support for the position that Congress can assign the adjudication of fair housing cases and the award of civil penalties and punitive damages to an administrative tribunal." The Department is right; *Tull* supports the constitutionality of S. 558.

There are those who have sought to seize upon this issue as a means to delay this vitally needed legislation. This hearing has been rescheduled three times to accommodate the Justice Department and members of the committee. Now, we are moving forward.

Mr. Chairman, let the forces of delay and obstruction take notice that we are going to move this bill and we will see that a strong fair housing bill is enacted in this Congress.

I appreciate very much the witnesses coming here today to give us their views and look forward to early action. I thank the Chair.

Senator SIMON. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman. I regret that I cannot be present for all of the proceedings today because of other commitments, and I know that it has not been possible to schedule this hearing easily.

It had been scheduled for last Thursday and I had some concerns about having the hearing go forward without being able to participate in it fully, but in the interests of expediting the matter I decided to raise no objection. But I express that consideration from the point of view of my regret that I cannot be here.

The issue which is framed is really a legal issue, and after reading the *Tull* case and after rereading *Atlas Roofing* and some of the other decisions, it is my conclusion that *Tull* does not provide any impediment to having an administrative proceeding without the right to jury trial.

These legal issues are never easy and I am prepared to listen to what others have to say, but it is a pure question of law. There is some confusion over the right of jury trial initially from the perspective that there may be a criminal provision or a quasi-criminal provision which would invoke the constitutional right to jury trial in looking at some of the provisions which extract very high civil penalties in *Tull* into the millions of dollars or penalties in OSHA proceedings or in other kinds of lines.

But it is very important at the outset to focus on the fact that the issue here is the seventh amendment right to jury trial in civil cases as opposed to the constitutional right to a jury trial in criminal cases.

The *Tull* case, I must say, makes a rather unique distinction in saying that the constitutional right to a jury trial exists on the issue of liability but does not exist on the issue of damages, but that is the way of the law and the interpretations are sliced rather finely.

As we know from our constitutional history, sometimes they are 5 to 4 decisions and the force of the argument is not the critical aspect; it is the numbers in the final count which makes the determination.

But it is worth noting for just a moment or two some of the reasoning of the Supreme Court of the United States in *Tull* which led it to its conclusion. The essential issue in interpreting the seventh amendment was whether the civil penalty provision was analogous to cases traditionally tried in courts of law, as contrasted with trials in courts of equity.

The Supreme Court of the United States made an exhaustive analysis concluding that the civil penalty was a particular species of an action in debt. It reviewed the decision in *Hepner* where there had been the withdrawal of a case to a jury because it was purely a question of law, an issue on which reasonable men could not differ where the evidence was uncontrovertible, and its earlier case in *Regan* where it turned on the constitutional right to a jury trial for civil issues.

But the critical aspect of the Supreme Court's decision in *Tull* is its reaffirmation of its decision a decade earlier in *Atlas Roofing Company* v. *OSHA*, where the Supreme Court of the United States in *Tull* specifically said, and it is worth quoting, "The Court has also considered the practical limitations of a jury trial and its functional compatibility with the proceedings outside of traditional courts of law in holding the seventh amendment is not applicable to administrative proceedings," citing *Atlas* and other cases, and then going on to say, "but the Court has not used these considerations as an independent basis for extending the right to a jury trial under the seventh amendment."

When the *Atlas* case is analyzed, and this is a case that I had occasion to work on before coming to the Senate, having litigated under the OSHA matters and having been involved in matters relating to criminal liability under OSHA, the Supreme Court of the United States in *Atlas* came to the conclusion, recited at page 1266:

> At least in cases where public rights are being litigated—e.g., cases in which the government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact--the seventh amendment does not prohibit Congress from assigning the fact-finding functions and initial adjudication to an administrative forum with which the jury would be incompatible."

The Court goes on at page 1269 to say:

> In sum, the cases discussed above stand clearly for the proposition that when Congress creates new statutory "public rights," it may assign their adjudication to an administrative agency without a jury trial without violating the seventh amendment injunction that a jury trial is to be preserved in suits in common law.

Now, I would say that when I first read this case almost a decade ago in the context of looking at a defendant's right to a jury trial in punitive measures from the point of view of a criminal proceeding where they are present in OSHA proceedings, it somewhat perplexed me where you talk about public rights because public rights are traditionally defined as rights of society in criminal cases against the peace and dignity of the laws of the State or of the Nation.

But be that as it may, there has been a specific delineation here about what the Court considers to be public rights and a specific holding that the Congress has the authority to establish administrative proceedings.

Traditionally, in a long line of cases, NLRB cases and otherwise, there are solid precedents that say that a jury trial is incompatible

with these kinds of proceedings. So I think that we are on track on the legislation which we have provided, and if the Congress does speak and if it is enacted and we define these public rights for administrative proceedings, we have the power to do so without contravening the constitutional right to a jury trial.

I thought it worthwhile to make that somewhat brief statement, Mr. Chairman. I will follow the transcript in these proceedings. I understand Assistant Attorney General Reynolds cannot be here and I think we ought to consider the matters, but my review convinces me, with reasonable conclusiveness, always subject to hearing the contradictory arguments, that there is no right to jury trial and we ought to move ahead with dispatch.

I thank the Chair.

Senator SIMON. Senator DeConcini.

Senator DECONCINI. Mr. Chairman, let me congratulate you for scheduling these hearings. I think they are very important. I think we have a dilemma. I do not come to the same absolute conclusion that my friends from Massachusetts and Pennsylvania seem to have resolved as a result of the *Tull* v. *U.S.* case.

It seems to me that case held that in a Federal district court, the seventh amendment guarantees a jury trial to determine liability under the Clean Water Act. As a result, I think the administrative law judge process in S. 558 has been called into question.

I think the purpose of these hearings is to listen to both sides. We have some outstanding witnesses here and I intend to follow carefully their testimony. I hope the witnesses will help us arrive at a conclusion whether or not we can do what is proposed with this legislation.

I am a strong supporter of fair housing legislation. I also support the right to jury trials. I may want to perhaps offer amendments to correct what I might feel is a seventh amendment area problem. It seems to me that we have a seventh amendment problem with this legislation.

Thank you, Mr. Chairman.

Senator SIMON. Senator Thurmond.

Senator SPECTER. Mr. Chairman, before Senator Thurmond speaks, I wonder if I might just interrupt for a moment to ask unanimous consent that the statement of Senator Hatch be included in the record.

Senator SIMON. It will be included in the record.

[The prepared statement of Senator Hatch follows:]

PREPARED STATEMENT OF SENATOR ORRIN G. HATCH

Mr. Chairman. Although it has been difficult to schedule this hearing, I am grateful for your efforts to permit a thorough inquiry into the constitutional issue posed by this bill. I understand that we will need to schedule a further hearing to obtain the administration's views, but that extra effort will also be worthwhile. We certainly cannot be too careful when it comes to upholding our obligation to ensure the constitutionality of legislation. I can remember having regrets that the Gramm-Rudman bill passed very precipitously in the face of constitutional concerns.

S. 558, the Fair Housing Amendments of 1987, poses a significant question with respect to the seventh amendment. The seventh amendment guarantees that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ." It is probably safe to say that preservation of jury trial rights was one of the major objections to the Constitution during its ratification. If the seventh amendment had not been subsequently includ-

ed in the Bill of Rights, the Constitution itself may have become too controversial to survive.

In the words of the Supreme Court, "the thrust of the amendment was to preserve the right of jury trial as it existed in 1791. *Curtis* v. *Loether* (1974). The *Curtis* case also held that statutory rights created after 1791 are obviously covered by the seventh amendment. In fact, the *Curtis* case specifically upheld jury trial rights in a title 8 fair housing case.

The importance of the seventh amendment resurfaced a few weeks ago when the Supreme Court held that an EPA enforcement action in district court must be accorded full jury trial rights. *U.S.* v. *Tull*, (1987). Some scholars have noted that a footnote of that case, however, supports the *Atlas Roofing* v. *OSHA* (1977) case. They cite that case for the proposition that Congress can assign cases to administrative judges without regard for the seventh amendment. In *Atlas*, the Court held that an action by the government to enforce safety regulations could be adjudicated in administrative courts.

Atlas, others have contended, only purports to permit "factfinding and initial adjudication" to be assigned to an administrative tribunal. As the *U.S.* v. *Tull* case established, the final enforcement of a damages action (or an action in debt) must be accorded full seventh amendment jury trial rights. In other words, *Tull* and *Atlas* may be fully consistent. *Atlas's* endorsement of administrative adjudication may be limited to initial factfinding proceedings in cases dealing with private common law actions.

If *Atlas* were read broadly to eliminate jury trials any time Congress creates an administrative alternative, it would mean that Congress would have the power to write the seventh amendment out of the Constitution by statute. Stated another way, Congress would be able to engage in random "court-stripping" under the guise of creating new administrative actions.

In 1978, the Carter Justice Department seemed to reach a similar conclusion. They stated, in response to questions about the ALJ mechanism found in an earlier version of this fair housing bill, that "[p]lainly, the seventh amendment question here is a close and difficult one. Were we to opine one way or the other, our conclusion would probably favor a finding that [the ALJ provision] is unconstitutional."

I did not always agree with the Carter Justice Department, but this conclusion makes sense. At the Virginia ratifying convention in 1788, Patrick Henry, who was primarily responsible for securing jury trial rights in the Bill of Rights, attacked the Constitution because, in his words, "we are to part with that trial by jury which our ancestors secured their lives and property with, and we are to build castles in the air and substitute visionary modes of decision for that noble palladium. . . Why do we love this trial by jury? Because it prevents the hand of oppression from cutting you off." Elliot's Debates 3, 544-545.

In light of this history and jurisprudence, this is indeed a difficult constitutional issue and I am pleased that we are taking the opportunity to examine the issues closely before presuming to change the status of private rights under Title 8.

Senator SIMON. I would also like to include in the record a letter from Professor Spann of the Georgetown University Law School, and Paul D. Carrington, who is dean of the Law School at Duke University.

[The information referred to above follows:]

GEORGETOWN UNIVERSITY LAW CENTER
WASHINGTON, D.C. 20001

GIRARDEAU A. SPANN
ASSOCIATE PROFESSOR OF LAW

June 6, 1987

Senator Paul Simon
Chairman
Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Senator Simon:

I am writing in response to your letter of June 5, 1987 requesting my opinion, as a professor of both constitutional and administrative law, concerning the constitutionality of certain provisions of S.558, the Fair Housing Amendments of 1987. After carefully reviewing that bill, I have concluded that although it raises two issues of potential constitutional interest, the bill as presently drafted is constitutional, and its validity would be upheld by the United States Supreme Court.

As I understand it, S.558 would extend the protections of Title VIII of the Civil Rights Act of 1968, commonly referred to as the Fair Housing Act, to handicapped individuals and to families with children. It would also revise the enforcement procedures of Title VIII by delegating to administrative law judges significant authority to conduct hearings with respect to housing discrimination complaints, to issue subpoenas and compel answers to interrogatories, to resolve discrimination complaints after hearing by making findings of fact and conclusions of law, and to order appropriate relief including the award of compensatory damages, punitive damages and cease and desist orders. Determinations of an administrative law judge would be reviewable by United States Courts of Appeals under a substantial evidence standard of review. See Section 8 of the bill, modifying Sections 811 and 812 of Title VIII. The broad enforcement powers delegated to administrative law judges under S.558 raise potential constitutional issues concerning the Seventh Amendment jury right and Article III limitations on the adjudicatory power of administrative agencies. In my opinion, however, neither provision would invalidate the bill.

1

The Seventh Amendment guarantees a right to trial by jury "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars". The Supreme Court has held that statutory causes of action that Congress has chosen to make subject to adjudication through an administrative enforcement scheme are not actions at common law within the meaning of the Seventh Amendment, and accordingly, are not within the scope of the Seventh

Amendment jury right. Atlas Roofing Co. v. Occupational Safety and health Review Commission, 430 U.S. 452, 454-55 (1977). This holding seems squarely to defeat any claim to a jury right that might be asserted in connection with the administrative enforcement provisions of S.558.

The recent decision of the Supreme Court in Tull v. United States, 55 USLW 4571 (U.S., April 28, 1987) reaffirms this holding. Tull holds that the Seventh Amendment jury right does extend to certain civil penalty actions filed in federal district court, but the Supreme Court carefully distinguishes judicial actions filed in court from administrative enforcement proceedings. Footnote 4 of the Tull opinion states:

> The Court has also considered the practical limitations of a jury trial and its functional compatibility with proceedings outside of traditional courts of law in holding that the Seventh Amendment is not applicable to administrative proceedings. See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 454 (1977); Pernell v. Southall Realty, supra [416 U.S.], at 383. But the Court has not used these considerations as an independent basis for extending the right to a jury trial under the Seventh Amendment.

55 USLW at 4573 n.4.

The reason for the Supreme Court's exclusion of administrative enforcement schemes from the scope of the Seventh Amendment jury right reflects constitutionally compelled judicial deference to Congress in areas of policy formulation. When Congress has made a considered decision not only to create a new statutory right but also to provide for efficient, expert enforcement of that right through administrative procedures, the Seventh Amendment does not interfere with this congressional policy determination. It is only when Congress is content with traditional judicial enforcement, and does not see any need to create a more efficient or expert administrative enforcement scheme -- the situation presented in the Tull case itself -- that the Seventh Amendment jury right can safely be applied by analogy to a statutory right without fear of frustrating congressional policy even though the right did not exist at common law. As long as S.558 reflects an intent of Congress to capitalize on the advantages of administrative enforcement for the rights created under Title VIII, the Seventh Amendment jury requirement will not preclude administrative law judges from exercising the authority delegated to them under the bill.

Article III of the Constitution imposes restrictions on individuals who are authorized to exercise the judicial power of the United States by requiring that federal judges be given life

78-076 O - 88 - 19

tenure and salary protection, and that they be appointed by the President and confirmed by the Senate. The Supreme Court, however, has construed these Article III limitations to be inapplicable to much of the adjudication done by Article I judges such as the administrative law judges created under S.558. See Commodity Futures Trading Commission v. Schor, 106 S.Ct. 3245 (1986); Crowell v. Benson, 285 U.S. 22 (1932). Performance of the functions assigned to administrative law judges under S.558 falls within the category of activities that the Court considers to be an exercise of administrative rather than judicial power. As a result, the Article III restrictions do not apply to the performance of such functions.

On occasion, the Supreme Court has held that Article III imposes limitations on the types of cases that can be adjudicated by an Article I judge. In Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), for example, the Court held that Article I bankruptcy judges could not adjudicate certain state law claims that were related to the bankruptcy proceeding. Such cases have been rare, however, and in my view, it is doubtful that even the minimal restrictions recognized in Northern Pipe Line survived the Supreme Court's more recent decision in Schor. Although Schor did not expressly overrule Northern Pipeline, it established such a broad range of issues that are susceptible to administrative adjudication that Northern Pipe Line now seems like an aberration that will be limited to its particular facts. Moreover, even if any Article III restrictions have survived Schor I am confident that they will apply only to the adjudication of state common law claims of the most traditional sort, and will not apply to the types of federal rights created by Title VIII. As a result, Article III does not impose any limitation on administrative law judges to perform the adjudicatory functions assigned to them by S.558.

I hope that my comments on S.558 will prove helpful to you and your Committee. If there is anything else that I can do to be of assistance, please feel free to contact me.

Yours truly,

Girardeau A. Spann

Girardeau A. Spann

TESTIMONY ON TITLE VIII AMENDMENTS, S. 558
Paul D. Carrington
June 4, 1987

My name is Paul D. Carrington. I have been teaching law, primarily in the field of Civil Procedure, since 1957. I am presently a professor and dean of the law school at Duke University. My scholarship over 30 years has touched on many aspects of the legal process and profession, and includes a systematic treatment of the constitutional right to jury trial in civil cases which was published last year as one of the major articles in the McMillan Encyclopedia of Constitutional Law edited by Levy and Karst. I have been asked to report to you on the Seventh Amendment aspects of S. 558.

I leave entirely to others the question of whether the present bill is necessary or desirable. I can fully support the aims of fair housing legislation, but I am not a student of fair housing law and have had no experience with its enforcement; hence, I am not qualified to express on opinion on the wisdom of these amendments.

I can say categorically that the present bill does not pose an issue of constitutional law. As amended, the law would provide for private enforcement by aggrieved individuals bringing civil actions in state or federal courts. The amended law does not limit the right to jury trial in such civil actions.

In the federal courts, such actions will be jury triable; in Curtis v. Loether, 415 U.S. 189 (1974), the Supreme Court held that a defendant in a civil action brought under Title VIII of the present Civil Rights Act is entitled to demand trial by jury, at least with respect to the plaintiff's claim for damages.

It is not certain, however, that a plaintiff or a defendant in a private enforcement action would be entitled to a jury trial if the action were brought in a state court. This would be a question to be resolved by reference to the law of the state in which the action is brought. This is so because the Seventh Amendment has no application to proceedings in state courts; it was so held by the Supreme Court in 1874 in Walker v. Sauvinet, and that decision has never been called into question. The Seventh Amendment is generally given as the primary demonstration that the Fourteenth Amendment, which does apply to state courts, does not incorporate all the provisions of the Bill of Rights, but only some. It is not a denial of the due process of law guaranteed by the Fourteenth Amendment if a state declines to provide a jury in civil cases, or in a particular class of civil cases. Presumably, the Congress of the United States could require a civil jury in actions brought in state court which arise under federal law, but Congress has never, so far as I know, not even in the Federal Employers' Liability Act, attempted to regulate state civil procedure in this way. Even Justice

Black, perhaps the leading exponent in this century of civil jury trial, acknowledged in an FELA case the power of a state to abolish civil jury trial altogether. See Dice v. Akron, Canton & Youngstown Railroad Co., 356 U.S. 525 (1958).

The new amendments would create yet a third forum in addition to the state and federal courts for the enforcement of the fair housing laws by creating an administrative forum within the Department of Housing and Urban Development. Just as the Seventh Amendment has no application to proceedings in state courts, it also has no application to proceedings in administrative agencies. The leading case establishing the inapplicability of the Seventh Amendment is NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), which affirmed that the Labor Board can enforce contracts as directed by Congress without conducting trial by jury. It is pertinent to note that the NLRB seemingly cannot itself conduct a jury trial that would conform to the requirements of the Seventh Amendment, nor could the Secretary of Housing and Urban Development; the conduct of a jury trial appears to require the presence of an Article III judge.

The holding in Jones & Laughlin was found to apply as well to bankruptcy proceedings in Katchen v. Landy, 382 U.S. 323 (1963); the Court there emphasized the practical considerations that made jury trial inappropriate to the exercise of summary jurisdiction by the bankruptcy court. The Jones & Laughlin case was distinguished by the Court in Curtis v. Loether, the Title VIII case previously mentioned, but with the Court again affirming that the Seventh Amendment does not apply to administrative proceedings. That position was reaffirmed in Pernell v. Southall Realty, 416 U.S. 363 (1974), and in Atlas Roofing Co. v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1977). It was reaffirmed yet again this year in Tull v. United States, 107 Sup.Ct. 1831, in a footnote in which the Court cites with approval the Atlas Roofing holding on the issue. The point seems, therefore, to be entirely settled: the Seventh Amendment has no application to administrative proceedings conducted under the aegis of the Secretary of Housing and Urban Development.

It may be helpful to the Committee to suggest what seems to be the underlying premise which guides these cases. To do so, it is useful to distinguish between the right to jury trial in civil cases under the Seventh Amendment and the right to jury trial in criminal cases under the Sixth Amendment. In criminal cases, the historic function of the jury is to serve as a bulwark against the executive and legislative arms of the government. That function of the jury is maintained today throughout the common law world and in legal systems based on Roman law as well. In civil cases, especially those involving private enforcement of the law, that function does not exist; it is perhaps for that reason that civil jury trial has been discontinued everywhere in the world except in the United States. We have kept the civil jury as a check not on the executive or the Congress, but as a check on the federal judge whose life tenure makes those officers

suspect to those of us raised on the Populist traditions of this country. The function of the civil jury is to diffuse the otherwise autocratic power and authority of the judge.

This latter function, which largely explains the continued vitality of the civil jury in American courts, has little application to non-traditional civil proceedings such as those which occur in bankruptcy or in administrative forums such as that proposed for Title VIII. In these forums, power and authority are already divided. The administrative law judge may be distrusted, but he is subject to an array of accountabilities unknown to the United States District Judge, including appellate review by such a judge. The condition of autocracy which would bring the underlying values of the Seventh Amendment is not present; the right to jury trial therefore has no application.

Perhaps there are Senators who nevertheless favor jury trial even if it is not constitutionally required. Trial by jury in a civil case does get the community involved in public matters; it may be a means of assuring that community standards of morality are observed; it may provide a more gratifying experience for the litigants than trial before a single professional judge. On the other hand, there are plausible reasons to avoid trial by jury in civil cases: trials are longer and more expensive for both the parties and the system; particularly with six-person juries, outcomes are less predictable and settlement is therefore more difficult and less likely; law enforcement is a bit more erratic.

It is not my role today to weigh those competing considerations as they apply to fair housing cases. All that I say is that the choice is yours and the choice is not impeded by the Seventh Amendment so long as the alternative forum is an administrative agency, not an Article III court.

Senator SIMON. Senator Thurmond.

OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. Thank you, Mr. Chairman. Mr. Chairman, this morning the subcommittee is considering the issue of the right of a trial by jury as it applies to administrative hearings envisioned by S. 558, the so-called fair housing bill. I appreciate the courtesies of both the chairman and ranking member in involving me in this hearing process.

The right to a trial by jury has long been an issue very dear to me and to my understanding of the Constitution. Today, we must review the issue of a jury trial in civil cases from at least two perspectives: first, as a legal constitutional right under the seventh amendment; second, as a matter of good public policy.

Now, the legal analysis. The first issue seems simple to everyone. The seventh amendment states, and I quote, "In suits at common law, where the value of the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." However, the Supreme Court has struggled to reconcile the seventh amendment with new statutory rights and new governmental processes, especially administrative proceedings.

As we review the Court decisions on the seventh amendment within administrative proceedings, it is most important to remember that the system proposed by S. 558 has no parallel in law. Therefore, to claim there are no constitutional questions because the Supreme Court has so ruled is both simplistic and wrong.

First, as an administrative approach of first impression—namely, having the government step into the shoes of a party in what is traditionally a private action, allowing actual damages and punitive damages to be granted to a private party, and placing review in the court of appeals—this bill presents issues which fall outside any specific Court decision on jury trial within administrative proceedings.

Therefore, we must analyze Court decisions on seventh amendment issues before we make a decision on the constitutionality of S. 558. Within the administrative context, we need to look at the *Atlas Roofing* case. This decision, which is held out by some as the final word on expansive administrative proceedings, actually contains severe limitations and a great deal of ambiguity.

Certainly, as the Court indicated, *Atlas* cannot be open-ended. Otherwise, Congress could eviscerate the Seventh Amendment by transferring all civil disputes to the administrative process. Therefore, limitations must be found within the text of *Atlas* or inferred from it.

As for explicit limitations, we find examples within the *Atlas* text. Atlas speaks of initial factfinding at the administrative level, which does not necessarily preclude a jury right at a later stage.

Also, *Atlas* specifically limits itself to public rights and clearly disclaims coverage of private rights. Additionally, some have inferred a "functional equivalent of a court" test to ensure that the assignment of issues to administrative proceedings is not merely a sham to avoid the seventh amendment jury right.

Under either limitation on *Atlas*, S. 558 fails, first, because the right protected under the bill is a private right under the holding in *Curtis* v. *Loether*, and damages here, which really are the main point of the bill, benefit a private party.

Second, the administrative scheme envisioned in S. 558 leaves intact the private cause of action in district court and then duplicates this right in an administrative proceeding, which has the effect of simply avoiding the seventh amendment right to a jury trial established in *Curtis*. If such a scheme is constitutional, the seventh amendment would be completely meaningless. Such a reading would be unfathomable in light of the *Tull* case.

Therefore, our task is to read the *Atlas*, *Tull* and *Curtis* cases, along with cases addressing the article III issue, in a manner which preserves the garden-variety type of administrative law judges while protecting the seventh amendment. This can be done, but such a reading does not support the far-reaching scheme envisioned in S. 558.

Now, as to the policy issues, aside from the constitutional issues, it is bad policy to pursue a scheme such as S. 558. Do we really want Americans subjected to bureaucratically or judicially imposed burdens in these types of cases without a judgment by fellow citizens?

Certainly, jury trials can be slow, but they serve a valuable purpose in our form of government by protecting individual rights. If our goal is speed and efficiency, why not remove all such disputes to a non-judicial forum and resolve the issues by flipping a coin? That would be quick, but it would not be just or protective of individual rights or supported by the community.

In closing, let me say this is not a new issue. Almost 10 years ago, the Carter administration expressed constitutional concerns about the approach envisioned in this bill. Professor Gellhorn, the administrative law expert, has also expressed similar concerns. These concerns have not gone away.

This hearing should help begin our discussions of this important constitutional right and I hope will mark the beginning of real efforts to achieve a fair housing bill which will correct any discrimination problems while protecting individual rights. I look forward to the testimony today and the testimony we will receive from the administration.

Senator SIMON. Thank you.

Senator THURMOND. Mr. Chairman, I ask permission that a memorandum from the Department of Justice be placed in the record at this point.

Senator SIMON. It will be. Do you want to describe the memorandum?

Senator THURMOND. Yes, sir. It is a memorandum for the Honorable Ruth T. Prokop, General Counsel of the Department of Housing and Urban Development; re: constitutionality of section 810 of H.R. 3504, the Edwards-Drinan bill.

Senator SIMON. It will be entered in the record.

[Information follows:]

Deputy Assistant Attorney General
Office of Legal Counsel

Department of Justice
Washington, D.C. 20530

JAN 25 1978

MEMORANDUM FOR THE HONORABLE RUTH T. PROKOP
General Counsel, Department of Housing and
Urban Development

Re: Constitutionality of Section 810 of H.R. 3504
(The Edwards-Drinan Bill)

This is in response to your letter of November 18, 1977, 1/ requesting this Office's opinion concerning the constitutionality of the civil damages provisions of the Edwards-Drinan bill (H.R. 3504). Specifically, you have inquired whether the bill's administrative complaint procedure offends the Seventh Amendment guarantee that "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." For the reasons that follow, it is our opinion that the provisions in question are suspect under the recent Supreme Court decisions interpreting the Seventh Amendment. As you are aware, the issue is a close one and would almost certainly be litigated. With these considerations in mind, we have suggested several ways in which the language of the provision could be altered to improve its chances of withstanding scrutiny.

I.

H.R. 3504 would amend Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 et seq., by creating three alternative mechanisms for enforcement of its fair housing provisions. Section 812 preserves private enforcement by means of civil suit; section 811 provides for "pattern or practice" actions by the Attorney General. Most importantly, for purposes of this discussion, the bill authorizes the Secretary of Housing and Urban Development (HUD), either in response to a private complaint or on her own initiative, to investigate allegations of discriminatory housing practices. If she finds reasonable cause to believe the charges to be true, she is required either to refer the matter to the Attorney General for the filing of a civil action against the offender, or to file an administrative complaint. If the administrative procedure is followed, the respondent is entitled to notice

---

1/ We wish to express our appreciation for the manner in which your request was prepared for presentation to this Office. While it has long been the practice of the Office of Legal Counsel to request that general counsels provide us with a statement of their views, we too frequently have not been aided by the sketchy and incomplete presentations provided. We have been materially assisted by the clear exposition of the issues as set forth in your submission.

and to the opportunity for a hearing on the record; the person conducting the hearing may also allow any aggrieved person to intervene. The hearing officer, after making findings of fact and conclusions of law, may award various forms of relief including money damages, equitable and declaratory relief, and punitive damages up to $10,000; temporary or preliminary relief is also available pending final disposition of the complaint. Review is in the courts of appeal using a "substantial evidence" standard. The bill also authorizes the Secretary to assess a civil penalty of $1,000 for each day during which a violation continues after the date on which the administrative order becomes unreviewable. Section 811(b) empowers the Attorney General, at the request of the Secretary, to institute civil proceedings to enforce either final orders or civil penalties of this sort.

In applying the Seventh Amendment to this statutory scheme, two principles are immediately clear. First, it is now firmly established that the Seventh Amendment "does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." Curtis v. Loether, 415 U.S. 189, 194 (1974). Thus, the Supreme Court has held that a jury may be demanded in suits in the federal courts for actual and punitive damages under section 812 of the Civil Rights Act of 1968. Id. Similarly, in Pernell v. Southall Realty, 416 U.S. 363 (1974), the Court held that the Seventh Amendment applied in civil suits in the District of Columbia courts for recovery of possession of real property.

A second principle has also emerged -- the Seventh Amendment simply does not apply where Congress has properly assigned the functions of factfinding and initial adjudication to an administrative tribunal with whose proceedings the use of a jury would be incompatible. Thus, in Atlas Roofing Co. v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1977), the Supreme Court upheld Congress' choice of a specialized administrative body to ascertain whether employers were maintaining unsafe working conditions and to impose civil penalties. The Court found no constitutional right to a jury under such circumstances:

> . . . when Congress creates new statutory "public rights," it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be "preserved" in "suits at common law." Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation or prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field. This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law

instead of an administrative agency. 430 U.S. at 455 (footnote omitted). 2/

While it is therefore clear that juries need not be imported into administrative proceedings designed by Congress to give effect to agency expertise, it is also apparent that Congress may not be altogether free to elect such administrative forums under any and all circumstances. Thus, in Atlas Roofing, the Court was careful to go no farther than to approve a jury-free administrative proceeding where "public rights" were involved. 430 U.S. at 458. Unfortunately, this talismanic phrase was not well defined. Instead the Court spoke somewhat circularly in terms of examples --"e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact" (id. at 450); "e.g., where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights" (id. at 458).

The sovereign's prerogative to sue and to be sued as it deems appropriate was similarly recognized and discussed at length in Murray's Lessee v. Hoboken Land Co., 59 U.S. (18 How.) 272, 284 (1856) ("There are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States as it may deem proper.") See also Ex Parte Bakelite, 279 U.S. 438, 451 (1929) ("Legislative courts also may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible to it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.") Accordingly, Congress' choice of administrative forums as means for collecting civil penalties to be deposited into the public treasury has repeatedly been upheld. See, e.g., Helvering v. Mitchell, 303 U.S. 391 (1938).

So, too, has the use of administrative bodies which, in the course of enforcing public policy, incidentally provide relief to private citizens. Thus, in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), the Court upheld agency action under the National Labor Relations Act in requiring a private employer to reinstate an employee with back pay following an unfair labor practice. Likewise, in Block v. Hirsh, 256 U.S. 135 (1921), the Court rejected a Seventh Amendment challenge to a statute temporarily suspending the legal remedy of ejectment and establishing

---

2/ In reaching this broad conclusion, the Court recharacterized the holding of an earlier case, Kachen v. Landy, 382 U.S. 323 (1966), which had upheld the power of a bankruptcy court, exercising summary jurisdiction without a jury, to adjudicate the otherwise legal issue of voidable preferences. Rather than treating this holding as compelled by the traditional distinction between courts of law and courts of equity, the Court observed that this specialized court of equity "constituted a forum before which a jury would be out of place and would go far to dismatle the statutory scheme." 430 U.S. at 454 n. 11.

an administrative tribunal to determine fair rents at which tenants would be allowed to hold over despite the expiration of their leases.

Nevertheless, it cannot be concluded, based on this rather limited evidence, that administrative proceedings initiated by a public agency but providing the full panoply of judicial relief to private parties are necessarily permitted under the Seventh Amendment. The proceedings before the NLRB at issue in Jones & Laughlin were spurred by private complaint, yet the relief available -- reinstatement with back pay or an award of back pay alone -- was basically equitable in nature (cf. Slack v. Havens, 522 F.2d 1091, 1094 (9th Cir. 1975) (Title VII)); moreover, the government agency authorized to hear and decide private complaints, not private individuals who might receive relief in the administrative forum, was alone empowered to trigger proceedings with respect to unfair employment practices and to seek enforcement of its orders in subsequent court proceedings (see Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261 (1940)). The holding of Block v. Hirsh also appears relatively narrow when closely examined. Although the result in that case has subsequently been characterized rather broadly, 3/ the Court's reasoning may be misunderstood unless seen in context. Mr. Justice Holmes, writing for the Court, spoke specifically in terms of government regulation of the wartime housing industry. Thus, he emphasized that "[i]f the power of the Commission established by the statute to regulate the relation is established, as we think it is . . . this objection [concerning the unavailability of trial by jury] amounts to little. To regulate the relation and to decide the facts affecting it are hardly separable." 256 U.S. at 158 (emphasis added). In Block, therefore, the rent commission played a role comparable to that of the Interstate Commerce Commission or other federal agencies which control the prices charged by private entrepreneurs and incidentally benefit members of the public by requiring those regulated to comply with certain governmentally-set standards. The commission did not simply step into the shoes of a judicial tribunal and afford all-purpose relief to complaining private parties.

An even more important warning is found in Crowell v. Benson, 285 U.S. 22 (1932), which, while sustaining the role of an administrative tribunal in finding facts and awarding relief under the Longshoremen's and Harbor Workers' Compensation Act, characterized the case at bar as "one of private right, that is, of the liability of one individual to another under the law as defined," id. at 51. Thus, although the role of the administrative tribunal in Crowell was solely adjudicatory rather than also prosecutorial in nature, the Court did not dwell on this distinction but focused instead on the nature of the liability created. While the proceedings in Crowell were deemed to be adjunct to the admiralty jurisdiction of the federal courts and therefore to present no Seventh Amendment problem, two conclusions relevant to our consideration here are suggested by this statement: (1) more than a simple "public interest"

3/ "We may assume that the Seventh Amendment would not be a bar to a congressional effort to entrust landlord-tenant disputes, including those over the right to possession, to an administrative agency," Pernell v. Southall Realty, supra, 416 U.S. at 383.

sufficient to sustain Congressional legislation is necessary to come within the phrase "public right" as used in Atlas Roofing; and (2) the nature of relief afforded by an administrative tribunal may not necessarily be irrelevant for Seventh Amendment purposes merely because a government agency plays a formal role in instituting those administrative proceedings.

The constitutionality of the administrative proceedings envisioned by the Edwards-Drinan bill must be tested against this rather inconclusive standard of reference. The proposal and the context in which it arises differ sufficiently from administrative procedures approved under existing case law so as, at the very least, to leave room for doubt. Although HUD, rather than a private plaintiff, would actually be responsible for filing the administrative complaint and would do so only if, in the course of its investigation, it found a charge to be supported by reasonable cause, it would not be the sole enforcer of the statutorily created guarantee of fair housing practices as was true in NLRB v. Jones & Laughlin. Neither would it act in a regulatory capacity akin to that of the rent commission in Block v. Hirsh. Moreover, the Department would enter the fray, not at the outset, but nearly 10 years after the creation of a private cause of action in the district court which provides for identical remedies, and nearly four years after the Supreme Court expressly ruled that under such circumstances trial by jury must be available on demand. It is therefore unlikely that removing section 810's obvious cross-reference to section 812's civil cause of action or the adoption of cosmetic changes in nomenclature will suffice to obviate the potential constitutional questions inherent in the proposal.

It may well be that the courts, when asked to apply the Seventh Amendment in this context, would adopt a broad rule based on the specialized forum approach taken in Atlas Roofing 4/ and the sovereign prerogative analysis of Murray's Lessee. Following this line of reasoning, so long as an administrative agency, and not simply private parties, played a prosecutorial as well as adjudicatory role in administrative proceedings, the Seventh Amendment simply would not apply. The existence of a related private right of action need not undercut the legitimacy of Congress' choice in this regard; rather, the continued availability of such a judicial forum merely provides an alternative means by which private citizens can vindicate the public interest also enforced by the sovereign in its own right.

Different reasoning could, however, dictate a different result. It could be argued that Congress should not be able, under the vague rubric "public right," to circumvent the Seventh Amendment completely by creating a chain of administrative courts capable of giving traditional common law remedies to private litigants seeking relief from wrongs (such as dignitary torts) traditionally regarded as private in character. Plainly, the Seventh Amendment question here is a close and difficult one. Were we to opine one way

---

4/ Such a ruling could also rest on the expansive dictum in Mr. Justice White's opinion in that case emphasizing the breadth of Congress' prerogative to select the manner in which it will go about resolving important "public" issues. 430 U.S. at 455.

or the other our conclusion would probably favor a finding that section 810 is unconstitutional. Rather than concluding our views on this equivocal note, we have considered whether it might be possible to modify section 810 to improve its chances of withstanding constitutional attack. It should be clearly understood, at the outset, that we do not profess to share your Department's expertise and sensitivity to the policy and administrative considerations that would inevitably come into play here. Our advice should be seen as merely suggestive of ways in which the constitutional hurdles could be reduced.

II.

First, private actions in district court seeking actual and punitive damages and other relief might be be preserved, but the nature of the proposed administrative proceedings altered. Use of an administrative forum to impose civil penalties without recourse to trial by jury was expressly approved in Atlas Roofing; provision for equitable relief in the form of temporary or permanent injunctions in no way offends the Seventh Amendment's preservation of juries in "Suits at common law." It could be contended that to thus limit the administrative relief available by omitting any provision for awards of actual or punitive damages would not seriously undercut the efficacy of the proposal. Actual damages resulting from a dignitary tort are difficult to prove, and the threat of a civil penalty due the government would do as much to encourage compliance with the law as would the possible imposition of punitive damages. 5/ This option would seem almost certainly to avoid any possible problem under the Seventh Amendment.

Second, the private action in district court might be eliminated, and the remedies now available in that forum instead provided in the course of administrative proceedings. The development of legislative history demonstrating a belief by Congress in the necessity for a strong governmental role in order to vindicate the public interest in nondiscriminatory housing practices would provide added support for the claim that the choice of an administrative forum was more than a ruse to eliminate Seventh Amendment rights incident to the existing civil cause of action. This option would be further strengthened if the provision for punitive damages were eliminated and civil penalties instead imposed to run in favor of the government rather than the private complainant.

Third, the bill's treatment of the mechanism by which administrative awards are to be enforced could be modified. Section 811(b) indicates that the Secretary of HUD may request the Attorney General to institute civil proceedings for this purpose; it may, therefore, be inferred that

---

5/ Moreover, the bill as presently drafted seems to invite money-minded plaintiffs to bring charges in the administrative forum, then to return to the district court if their initial efforts prove unsuccessful. The resulting duplicated effort by administrative and judicial officers, costs to defendants, and problems of res judicata would seemingly be at least somewhat reduced if injunctive relief were the only remedy available in both forums.

no power to sue for enforcement is meant to lie in the private complainant. Express language disallowing such claims by other than the Attorney General could enhance the claim that a public right, not a private right, is being vindicated. Consideration might also be given to vesting the reviewing circuit court of appeals with the power to enforce such awards (see, e.g., 15 U.S.C. § 45(d), the review provision applicable to orders of the Federal Trade Commission under section 5 of the Federal Trade Commission Act) instead of simply incorporating the provision authorizing such courts to enjoin, set aside, suspend or determine the validity of orders as set forth in 28 U.S.C. § 2342. The awkward asymmetry of a civil suit in which jury trial is guaranteed pursuant to Curtis, and an enforcement action, also in the district court, which provides absolutely identical relief, would therefore be avoided. 6/

Finally, a requirement that the Secretary of HUD determine that administrative proceedings are in the public interest as is the case in FTC proceedings under 15 U.S.C. § 45 would enhance the emphasis upon the "public right" as opposed to "private right" aspects of this bill that are now left to be inferred from the statutory scheme. Although such a change is unlikely to be determinative to a court's interpretation of the measure, it may weigh the balance in favor of sustaining the proposed administrative procedure.

As stated above, we are not in a position to judge the practical merits of any of these options. Nor are we able to assure you that the adoption of any alterations would obviate the possibility of a successful challenge to the administrative procedures contemplated here. We would urge that, whatever course you follow, steps be taken during the legislative process to underline wherever possible the public benefit aspects of this bill.

Larry A Hammond

Larry A. Hammond
Deputy Assistant Attorney General
Office of Legal Counsel

cc: Frank D. Allen, Jr., Esq.
Civil Rights Division

6/ While such an enforcement action is arguably merely an extension of the administrative proceedings and would not, therefore, trigger a right to a jury determination of the underlying facts, a contrary rule has, in the past, been adopted by at least one court with regard to suits to enforce the imposition of civil penalties under the Federal Trade Commission Act. See United States v. J. B. Williams Co., Inc., 498 F.2d 414 (2d Cir. 1974). A court, faced with the incongruous availability of jury trials in suits by private plaintiffs but not in enforcement actions brought by HUD to provide private complainants with identical relief might well determine that jury trials should be afforded in both cases. Such a result could significantly limit the efficacy of the administrative tribunal as a means of speeding the disposition of housing discrimination cases.

Senator THURMOND. The other is a letter to Janice Cooper, Esq., Committee on the Judiciary, U.S. House of Representatives, from Walter Gellhorn, University Professor Emeritus at Columbia University.

Senator SIMON. It will be entered in the record.

[Information follows:]

Columbia University in the City of New York | New York, N.Y. 10027

SCHOOL OF LAW 435 West 116th Street

May 10, 1978

Janice Cooper, Esq.
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

Dear Ms. Cooper:

Representative Edwards and you have asked me to comment on the provisions of H.R. 3504, which would empower the Secretary of Housing and Urban Development to enter orders akin to those of the courts in proceedings initiated by individuals who believed themselves to have been damaged by unfair housing practices.

In that connection you have been kind enough to send me a memorandum by Larry A. Hammond of the Office of Legal Counsel, dated January 25.

I have read Mr. Hammond's analysis carefully, and I find myself largely in accord with what he has had to say concerning the [illegible] provisions of H.R. 3504. As the bill is now drafted, I fear that it would evoke strong constitutional challenges, and I think the likelihood of successful challenge is significantly large.

I do not conclude, however, that the purposes of this branch of H.R. 3504 cannot be served by other enforcement devices. Mr. Hammond's memorandum suggests some different routes to the same goal. You may also wish to consider the reparation proceedings that are now available in the Interstate Commerce Commission, to permit recovery of excessive or discriminatory charges; the judgment of the Interstate Commerce Commission can be challenged in subsequent court proceedings, but in those proceedings, the ICC order is given very substantial force.

The fact that the Secretary's order can be couched in terms of dollars and cents is not, in my opinion, constitutionally hurtful in this day and age. What must be avoided, however, is too naked a transfer of power from the judiciary to the executive, which is what I think is central to the present proposal. A determination in an enforcement proceeding might well inure to the benefit of identified individuals (as happens, for example, when the National Labor Relations Board orders reinstatement, with payment of back wages, upon a finding that an employee has been discharged for a forbidden reason). That is different, however, from stirring judicial resentment by simply moving conventional inter partes litigation from one forum (a court) to another (an executive department).

Sincerely yours,

Walter Gellhorn
University Professor Emeritus

Senator KENNEDY. Just as a matter of information, is that the administration's position, the Justice Department's position, that is included in that memorandum, or is it just the opinion of one of the counsel down there or the chief counsel?

Senator THURMOND. The administration position, of course, will be explained when the representative comes up to speak and maybe I should not anticipate what he is necessarily going to say.

What we just put in the record is the Carter administration position.

Senator KENNEDY. So there. [Laughter.]

Senator THURMOND. That is a little surprising, is it not, Senator?

Senator KENNEDY. That will teach me to know the answer before I ask the question. [Laughter.]

Senator SIMON. We will hear the members of the panel now, and unless there is objection we will hear from all the members of the panel before we ask questions. We will enter your full statements in the record. We would ask you to limit your informal remarks to roughly 5 minutes, and when this little light turns red that means your 5 minutes are up.

First, we will hear from Prof. Arthur Wolf, of Western New England Law School.

A PANEL CONSISTING OF ARTHUR D. WOLF, PROFESSOR OF LAW, WESTERN NEW ENGLAND COLLEGE SCHOOL OF LAW, SPRINGFIELD, MA; PAUL D. KAMENAR, EXECUTIVE LEGAL DIRECTOR, WASHINGTON LEGAL FOUNDATION, WASHINGTON, DC; THOMAS D. ROWE, JR., PROFESSOR OF LAW, DUKE UNIVERSITY SCHOOL OF LAW, DURHAM, NC; AND RICHARD R. NAGEOTTE, NAGEOTTE, BORINSKY & ZELNICK, WOODBRIDGE, VA

Mr. WOLF. Thank you very much, Senator Simon and members of subcommittee. It is a pleasure to be here to discuss with you the constitutionality of the administrative enforcement provisions, in S. 558.

Let me make four points in summarizing my fuller statement. The first point is that the bill which you have before you, S. 558, in its administrative enforcement provisions is very similar to many other statutes that Congress has passed over the years.

Indeed, right from the very beginning of the Republic in 1793, Congress began authorizing administrative agencies and administrative officers to resolve claims and to issue orders in connection with those administrative proceedings.

Congress has varied in the remedies it has given such administrative agencies, but cease and desist authority and the power to award damages and reparations are very, very common kinds of administrative remedies that Congress has given to administrative enforcement agencies.

On page 4 of my statement, I list seven of them, but that is by no means an exhaustive list of the agencies that have such authority. The authority in S. 558 really is rather modest. It is not a radical bill by any means. There are, for example, administrative agencies in the executive branch that have the authority to dismiss corporate officers, which, to me, is a much more dramatic exercise of au-

thority through the administrative process. So in the whole scheme of things, S. 558 is really a rather modest proposal.

Point No. 2: With regard to the seventh amendment, the seventh amendment applies only in suits at common law. To the extent that S. 558 gives to the administrative agency the power to provide for equitable relief, which it does by way of cease and desist authority, that is perfectly consistent with the seventh amendment.

Even if you were in the U.S. District Court seeking equitable relief, you would not be entitled to a jury trial. So there should be really no discussion of S. 558 with regard to the cease and desist and other equitable powers which the bill does give to the administrative law judge.

With respect to damages, which is the central issue, the Supreme Court of the United States has, at least since 1932, approved the authorization by Congress of administrative authority to award damages and reparations. As I indicated earlier, there are a number of these statutes in existence now and Congress has for many years authorized such a remedy.

The Supreme Court in its cases has suggested two criteria by which we measure the constitutionality of administrative enforcement schemes which give the agency the power to award damages.

First, the Supreme Court has said: does this involve a public right? In the *Atlas Roofing* case the Supreme Court defined what it meant by a public right, which is when the government "sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact."

Certainly, S. 558 meets that criterion These are public rights. The proceeding in HUD is initiated by the Secretary acting in his or her sovereign capacity, and surely that complies with the Supreme Court's definition of public rights.

The second criterion is where the right is adjudicated before an administrative tribunal. The Supreme Court, again, in *Atlas Roofing* as well as in other cases, suggested, that so long as Congress commits the matter to an administrative agency where jury trials would be incompatible, that would be consistent with the seventh amendment.

In contrast, and this is where the *Tull* case becomes quite important, if Congress chooses to assign these same rights, whether you describe them as public rights or private rights, if Congress chooses to give them to the U.S. District Court, then the seventh amendment takes hold. That is the holding in *Curtis* v. *Loether;* that is the holding in the *Tull* case.

In no way does either of those cases suggest that if Congress gives the power to the executive branch through an administrative process that the seventh amendment would be applicable.

Indeed, in footnote 4 in the *Tull* case, the Court makes quite plain that *Tull* is in no way limiting or eroding or overruling the holding of *Atlas Roofing* with regard to the power of Congress to give administrative agencies the authority to award damages and civil penalties.

I see the time has expired, so let me just conclude by saying that the question of the separation of powers and article III is a matter which I have covered in my statement. The matter of punitive damages is also fully addressed there.

I will simply conclude by saying that, in my judgment, the bill is constitutional in all respects with regard to the administrative enforcement process.

I thank the subcommittee for the opportunity to discuss the matter with it and I look forward to your questions.

[Submissions of Mr. Wolf follow:]

TESTIMONY OF

ARTHUR D.WOLF
Professor of Law
Western New England College
School of Law

Mr. Chairman and members of the Subcommittee, I am pleased to accept your invitation to discuss with you the constitutionality of the administrative enforcement mechanism which S. 558 would establish to resolve claims of housing discrimination under Title VIII of the Civil Rights Act of 1968, commonly known as the Federal Fair Housing Act. As one who has practiced law and taught law school courses in federal jurisdiction, administrative law, discrimination, and civil procedure, I have a deep and abiding concern with the issues before you today. I hope my testimony will cast some light upon those questions and provide some guidance for your deliberations.

Under S. 558, the primary enforcement mechanism for Title VIII claims would be through an administrative process in the Department of Housing and Urban Development. A complaint filed with the Secretary could, if conciliation fails, lead to a hearing before an administrative law judge. If the judge finds a violation of Title VIII, the judge would be empowered under S. 558 to issue a cease and desist order and to award damages to the victim of discrimination. Such monetary awards could include both actual and punitive damages. Under the bill, the person found to have violated Title VIII would have a right of appeal to the United States Court of Appeals, which is the usual avenue of appellate review from agency orders.

Three principal questions may arise concerning the constitutionality of the administrative enforcement mechanism of S. 558: (1) whether the bill deprives the respondent of the right to a jury trial guaranteed by the Seventh Amendment to the United States Constitution; (2) whether the bill violates the doctrine of separation of powers and Article III of the Constitution; and (3) whether Congress may give an administrative agency or officer the authority to award punitive damages.

Based on the historical practices of Congress, the applicable Supreme Court precedents, and sound principles of constitutional interpretation, I conclude that the administrative enforcement mechanism in S. 558, including

the provision for punitive damages, is well within the parameters of the Constitution. In short, there is no constitutional impediment, under the Seventh Amendment, Article III, or otherwise, to the proposed administrative enforcement provision: (1) Congress has for many years assigned such authority to administrative agencies without challenge; and (2) when judicial attacks have been made on such arrangements, the Supreme Court has sustained the constitutionality of these enforcement mechanisms.

HISTORICAL BACKGROUND

Since the first days of the Republic, Congress has delegated "judicial power," including the authority to determine claims, to officers who did not have the guarantees of Article III, namely, life tenure and protection against salary diminution. In addition it has done so without the constraints of the Seventh Amendment and without infringing the doctrine of separation of powers. Sometimes Congress has assigned such authority to non-tenured judges sitting in "courts" and on other occasions it has given that power to officers and agencies which today would be called "administrative."

In 1793, for example, Congress established an administrative procedure to process pension claims by certain disabled veterans of the Revolutionary War. 1 Stat. 324 (February 28, 1793). Although federal judges doubted the constitutionality of an earlier statute which assigned pension claims to Article III courts, see Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792), I am not aware of any challenge to the 1793 statute permitting non-judicial officers to determine claims against the United States. Indeed until the National Legislature created the Court of Claims in 1855, Congress regularly heard and determined claims against the Government. No one has ever seriously questioned the power of Congress to process such claims itself.

In addition, since 1789, Congress has regularly assigned judicial power to territorial and other specialized courts that did not have judges with life tenure or protection against salary reduction. These judges handled the same kinds of cases adjudicated by regular Article III courts, yet they did not have the protections of Article III. In 1828, the Supreme Court sustained the constitutionality of such arrangements in American Insurance Co. v. 356 Bales of Cotton (Canter), 26 U.S. (1 Pet.) 511 (1828). In that case, the Court upheld the decree of a trial court in the Florida territory created to adjudi-

cate salvage cases under the admiralty jurisdiction. When the insurance company attacked the constitutionality of assigning such power to non-Article III judges, the Supreme Court rejected that contention.

Through the years, the American Insurance Co. case has been read as giving Congress the discretion to establish courts outside of Article III to resolve disputes "with respect to specialized areas having particularized needs and warranting distinctive treatment." Palmore v. United States, 411 U.S. 389, 408 (1973). See also Commodity Futures Trading Commission v. Schor, 106 S. Ct. 3245 (1986)(discussed herein); Thomas v. Union Carbide Agricultural Products Co., 105 S. Ct. 3325 (1985)(discussed herein). On numerous occasions, Congress has exercised that authority to create both "courts" and "administrative agencies" whose judges are not life-tenured nor protected against salary reduction.

Many of these agencies have authority to award damages. For example, the Interstate Commerce Commission, the Federal Maritime Commission, and the Commodity Futures Trading Commission have the power to hear claims of persons whose rights have been violated under the applicable statutes and to award damages or reparations for such violations. Furthermore, the Secretary of Agriculture, under the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, has the authority to entertain and resolve individual claims and to award damages to injured complainants. Finally, the Office of Workers' Compensation Programs in the Department of Labor processes claims of coal miners and maritime workers, among others, for employment-related injuries or deaths. In each of these instances, the initial hearing is before an administrative law judge who may enter an order awarding damages to the complaining party. In each case, the person found to have violated the law is required to satisfy the damage award.

LEGAL DISCUSSION

Introduction

Although Congress has, in numerous instances, authorized administrative agencies to adjudicate claims involving private persons, attacks on the constitutionality of such statutes have not been frequent. On those occasions when parties to these kinds of proceedings have challenged the validity of the statutory scheme, the Supreme Court has upheld the congressional enactment.

The earlier cases generally involved disputes between the United States and private persons to collect taxes, enforce the immigration laws, and impose customs duties. In those suits, the Government was the real party in interest and was the direct beneficiary of the remedy ordered by the administrative agency. See, e.g., Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320 (1909)(administrative proceeding to impose a civil fine for violating the immigration law).

In the later cases, however, private persons were the direct beneficiaries of the enforcement action even though the United States was the initiator of and a formal party to the administrative proceeding. See, e.g., Crowell v. Benson, 285 U.S 22 (1932)(administrative proceeding to determine compensation for work-related injury). In both the earlier and the later cases, the constitutional challenges proceeded generally along two lines: (a) that the unavailability of a jury in the administrative hearing denied the respondent's right to trial by jury guaranteed by the Seventh Amendment; and (2) that the absence of Article III protections for the hearing officer (i.e., life tenure and salary reduction) infringed the doctrine of separation of powers. Both of those objections may be raised regarding S. 558. In addition, the bill authorizes the administrative law judge, in appropriate cases, to award punitive damages which, to some, may also be objectionable.

Right to Jury Trial

In several challenges to the power of administrative agencies to adjudicate claims, the respondent has invoked the right to a jury trial in civil cases guaranteed by the Seventh Amendment to the United States Constitution. That Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

By its terms, the Seventh Amendment applies only to suits "at common law"; it has no application to actions seeking equitable relief or cases within the admiralty jurisdiction. See Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446-47 (1830). Thus to the extent the administrative law judge, under S. 558, enters a cease and desist order (the equivalent of an injunction), the respondent

would not be entitled to a jury trial even if the case were adjudicated in the United States district court. Thus no Seventh Amendment question arises in connection with the provision in S. 558 for cease and desist authority. N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)(upholding cease and desist order under National Labor Relations Act).

S. 558 also permits the administrative law judge to award money damages, the traditional remedy in suits "at common law." See Curtis v. Loether, 415 U.S. 189, 196 (1974). To be sure, this is not an unusual provision. As noted earlier, Congress has, in many other statutes, authorized administrative agencies and officers to award monetary relief in the form of damages. When the question has arisen, the Supreme Court has upheld such power. For example, in Crowell v. Benson, 285 U.S 22 (1932), a leading case, an injured worker sought compensation from his employer under the Longshoremen's and Harbor Workers' Compensation Act. The employer challenged the validity of the statute because it gave an administrative officer, who did not have the protections of Article III, the power to hear and determine claims of injured maritime workers.

The Act assigned to such officers adjudicatory duties, including the conduct of evidentiary hearings without a jury. Under the law, the administrative judge could award monetary relief to the injured worker even though the proceeding was formally between the federal agency and the private employer. In upholding the constitutionality of the statutory scheme, the Supreme Court ruled that: (1) Congress may assign the resolution of even "private" disputes to an administrative agency; (2) the Seventh Amendment requires jury trials only for "Suits at common law"; and (3) the constraints of Article III are satisfied so long as the private party to the proceeding may seek judicial review in an Article III court.

The Supreme Court has reaffirmed the essential holding of Crowell v. Benson on numerous occasions and in a variety of contexts. See, e.g., Commodity Futures Trading Commission v. Schor, 106 S. Ct. 3245 (1986)(discussed herein); Thomas v. Union Carbide Agricultural Products Co., 105 S. Ct. 3325 (1985) (discussed herein). In N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), for example, the Court sustained the National Labor Relations Act against claims that Congress is without constitutional power to give such adjudicatory authority to an administrative tribunal sitting without a jury

and without the protections of Article III. In that case, the Board had in fact awarded monetary relief, in the form of back pay, to individuals.

Similarly, in Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission, 430 U.S. 442, 450 (1977), the Court upheld the Occupational Safety and Health Act of 1970 against attacks based on the Seventh Amendment:

> At least in cases in which "public rights" are being litigated - e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact - the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible (footnote omitted).

In Atlas, the Court upheld the administrative imposition of a civil penalty which inured to the benefit of the Government. Thus Atlas explained the holding in Crowell by making clear that Congress may, consistent with the Seventh Amendment, assign disputes involving "public rights" to non-Article III courts sitting without juries.

In Curtis v. Loether, 415 U.S. 189 (1974), the Court underscored the importance of the nature of the rights involved and the congressional choice of forum. In that case, the plaintiff brought suit seeking money damages under the Federal Fair Housing Act in the United States District Court alleging a discriminatory housing practice in violation of Title VIII. The Supreme Court rejected the plaintiff's contention that, because the rights were statutory, not a suit at common law, the defendant was not entitled to a jury trial under the Seventh Amendment.

> [W]hen Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law (footnote omitted).

Curtis, 415 U.S. at 195. Accord: Tull v. United States, 55 U.S.L. Week 4571 (U.S. April 28, 1987).

What matters under Crowell, Jones & Laughlin Steel, Atlas Roofing, and Curtis is the forum to which Congress assigns the case and the nature of the rights involved. If the suit is between parties in the district court, then the Seventh Amendment requires, on the demand of either party, that the facts be tried to a jury if it is a suit at common law within the meaning of the Amendment. By contrast, if the dispute is between the United States and a

private party and Congress has given the matter to an administrative agency, the Seventh Amendment is inapplicable. "This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law instead of an administrative agency." Atlas Roofing, 430 U.S. at 455.

In Tull v. United States, 55 U.S.L. Week 4571 (U.S. April 28, 1987), the Supreme Court recently reaffirmed this fundamental jurisprudence of the Seventh Amendment. It held that the right to a jury trial extends to suits brought by the United States in the federal district courts to collect civil penalties. The Court ruled that in such instances the Seventh Amendment requires, upon timely demand, the impaneling of a jury. In Tull, the Supreme Court made clear that its ruling applied only to suits in the United States district court, not "to administrative proceedings." Tull, 55 U.S.L. Week at 4573 n. 4. The case did not overrule nor erode in any way Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1977), in which the Court held that the Seventh Amendment does not require a jury trial in actions by the United States to collect civil penalties through the administrative process.

Separation of Powers and Article III

The second line of attack against congressional delegation of "judicial" authority to administrative bodies relied on the separation of powers doctrine as embodied in the guarantees for judicial independence set out in Article III of the Constitution. That Article gives judges life tenure and protects their salaries from diminution by Congress. See generally The Federalist, No. 78. In The Federalist, No. 79, Alexander Hamilton wrote: "In the general course of human nature, a power over a man's subsistence amounts to a power over his will" (emphasis in original). Although the courts have, in this context, paid little heed to the appointment process as a further safeguard, this Committee is fully aware of the role that process plays in our judicial system. The appointment of federal judges by the President, with the advice and consent of the Senate, should be viewed as an additional mooring for the independence of the judiciary.

The Supreme Court has regularly rejected the proposition that all officers exercising judicial power must have the protections of Article III.

At least as early as 1828, the Court sustained the power of territorial judges to exercise judicial authority without such protections. American Insurance Co. v. 356 Bales of Cotton (Canter), 26 U.S. (1 Pet.) 511 (1828). Even when a President fired a non-Article III judge for apparently political reasons, the Court upheld congressional authority to assign judicial power to judges without the protections of Article III. United States v. Guthrie, 58 U.S. (17 How.) 284 (1854). The Court reached the same result when Congress assigned judicial authority to administrative officers who, like the territorial judges, did not have the protections of Article III. See, e.g., Crowell v. Benson, 285 U.S 22 (1932).

The decision of the Supreme Court in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) does not alter the conclusion reached here. In that case, the Court held only that Congress could not assign the resolution of state-created claims between private parties to bankruptcy judges who did not have the protections of Article III. You may recall that the House Committee on the Judiciary and subsequently the full House, in considering the Bankruptcy Reform Act of 1978, adopted the view that bankruptcy judges must have the protections of Article III. Because the Court in Northern Pipeline was sharply divided and produced no majority opinion, it is difficult to ascribe any additional meaning to the decision. None of the opinions in the case, however, suggested that Congress is without power to create administrative agencies to enforce, at a minimum, "public rights" without the strictures of Article III and the Seventh Amendment.

Furthermore, the Court in two recent decisions narrowed the potential reach of Northern Pipeline. In Thomas v. Union Carbide Agricultural Products Co., 105 S. Ct. 3325 (1985), the Court sustained a compulsory arbitration scheme with limited judicial review for resolving compensation disputes between private parties under the Federal Insecticide, Fungicide, and Rodenticide Act. That statute requires pesticide manufacturers to obtain federal approval for their products. As part of their data submission, the companies may rely on information filed previously by other registrants, but must compensate the prior submitter. If the manufacturers cannot agree on the amount of compensation, the matter goes to compulsory arbitration with judicial review of the arbitrator's decision limited to questions of "'fraud, misrepresentation or

other misconduct'." 105 S.Ct. at 3329. The Court upheld this statutory arrangement for resolving money disputes against claims that it violated Article III because the arbitrator lacks tenure and salary protections.

Last term the Supreme Court eroded even further the potential impact of Northern Pipeline. In Commodity Futures Trading Commission v. Schor, 106 S.Ct. 3245 (1986), Schor filed a complaint with the Commission to recover "reparations" because of alleged illegalities in the handling of his account by a commodity futures broker. The Commission has the authority to investigate and hear violations of the Commodity Exchange Act. If a violation is found, it may award money damages to the complainant. During the proceedings on his reparations claim, Schor objected to the broker's assertion of a state-based counterclaim, relying on the limitations arguably imposed by Article III and Northern Pipeline. In rejecting that contention, the Court held that allowing the respondent to plead the counterclaim advanced the "congressional goal of promoting efficient dispute resolution" through the administrative proceeding. 106 S. Ct. at 3250. The Court further noted that the "reparations scheme itself is of unquestioned constitutional validity," 106 S. Ct. at 3260, even though the Commission members did not have Article III protections.

The holdings of these cases, examining the reach of the Seventh Amendment, the separation of powers doctrine, and Article III, rest on sound principles of constitutional interpretation. First, the Seventh Amendment requires a jury trial only in "Suits at common law." The Supreme Court has interpreted this right to exclude matters which Congress has assigned to an administrative agency where juries would be incompatible with the process. When one considers that literally millions of claims are filed each year with federal agencies, the thought that jury trials would be required to resolve such claims boggles the mind.

Second, the Constitution gives Congress discretion to create lower federal courts with as much of the "judicial power" defined in Article III as it deems appropriate. Thus Congress could leave the enforcement of Title VIII claims entirely to the state courts where the Seventh Amendment does not apply. See Curtis, 415 U.S. at 192 n.6. Indeed, under the Federal Employers' Liability Act, plaintiffs have the choice of a state or federal court, and if they choose the state court, the defendant cannot remove the case to the fede-

ral forum. 28 U.S.C. § 1445(a). This is true also in certain federal damage suits against common carriers under $10,000 in value. 28 U.S.C. § 1445(b). Civil actions against private persons under the Consumer Product Safety Act cannot be brought in federal court at all if their value is less than $10,000. 15 U.S.C. § 2072(a).

Third, Congress must have some flexibility to deal with the problems of court congestion when selecting enforcement mechanisms. As the Supreme Court stated in Atlas Roofing:

> Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation or prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field.

430 U.S. at 455. The National Legislature may choose the administrative process, in preference to courts or arbitration, as a way of resolving disputes arising under Title VIII in a fair, speedy, and efficient manner.

Fourth, to be sure, the justifiable fear is that Congress could abolish the federal courts and assign all cases to administrative agencies without the protections of Article III. But Crowell v. Benson and its progeny preclude that possibility. Under those precedents, Congress must provide for judicial review in an Article III court. Under S. 558, the respondent would have a right of review, both as to law and fact, in a United States Court of Appeals. The appellate court would review the legal issues de novo and the usual standard of "substantial evidence" would govern review of factual determinations.

Punitive Damages

S. 558 also gives the administrative law judge the authority to award punitive damages. Although I have uncovered no federal statute which is comparable, several state legislatures have given their human rights agencies the authority to award punitive damages in housing discrimination cases. You may wish to examine the relevant statutory language from the California, Minnesota, and Oklahoma statutes set out in Appendix A. The complete results of my survey of state fair housing statutes are compiled in Appendix B.

While the provision for the administrative award of punitive damages may raise policy issues, it does not pose serious constitutional questions. In the Atlas Roofing case, supra, the Supreme Court upheld the imposition of civil penalties through the administrative process for violations of the Occupa-

tional Safety and Health Act of 1970. In the decision, the Court noted its longstanding interpretation of the Constitution which permits Congress to "opt for administrative enforcement" without jury trials for the "imposition and collection of fines." 430 U.S. at 460. Over 50 years ago, the Court held that "due process of law does not require that the courts, rather than administrative officers, be charged, in any case, with determining the facts upon which the imposition of such a fine depends." Lloyd Sabaudo Societa v. Elting, 287 U.S. 329, 335 (1932).

Providing for punitive damages through the administrative process is not constitutionally different from authorizing civil penalties. The Supreme Court has recently observed that "the remedy of civil penalties is similar to the remedy of punitive damages." Tull v. United States, 55 U.S.L. Week 4571, 4574 n. 7 (U.S. April 28, 1987). Indeed both remedies serve the goals of retribution and deterrence. The only difference of any moment is that punitive damages go to the victim of discrimination while civil penalties go into the United States Treasury. This distinction is of no constitutional significance because the impact on the defendant is the same. As the West Virginia Supreme Court of Appeals has observed:

> The fact that the money goes to the injured party does not change its effect on the respondent, which is to secure compliance with the Commission's order and to depress the discriminator's ambition to repeat the misbehavior.

State Human Rights Commission v. Pearlman Realty Agency, 239 S.E.2d 145, 147 (1977). Nothing in Article III, the Seventh Amendment, the Due Process Clause, nor any other provision of the Constitution requires the Congress to commit the assessment of punitive damages to the courts alone.

Consequently, the key question in determining whether an administrative tribunal can order punitive damages is the clarity of the enabling statute, not its constitutionality. "The general rule is that an administrative agency cannot award punitive damages absent express statutory language allowing such an award." Chauffeurs, Teamsters and Helpers, Local Union No. 238 v. Iowa Civil Rights Commission, 394 N.W.2d 375 (Iowa S. Ct. 1986); cf. Teamsters Union v. Morton, 377 U.S. 252, 260 (1964). Thus if Congress wants the administrative law judge in housing discrimination cases to have the power to award punitive

damages, it must say so clearly and unequivocably. S. 558, as currently drafted, meets that test.

The purpose of S. 558 is to provide an efficient, inexpensive, and effective remedy for victims of housing discrimination, while providing a fair and impartial tribunal for persons accused of violating Title VIII. If the administrative process is to work properly, victims should be encouraged to invoke it. If they cannot receive the same relief administratively as they can in the courts, such persons will forego the administrative process for the more effective judicial remedy. That might very well occur if only the courts, and not the administrative law judge, can award punitive damages.

In addition, while punitive damages are reserved for egregious cases of discrimination, their availability will generally provide an incentive for the respondent to settle meritorious claims at the administrative level. Informal settlement of housing disputes eliminates the need to invoke the formal, dispute resolution machinery of either court or agency. This will advance the congressional goal of resolving housing discrimination claims through conciliation. Finally, in some cases, punitive damages will be the only remedy because the victim may not have suffered any actual damages and may have already found other housing accommodations. If the administrative law judge does not have the authority to award punitive damages, such victims are effectively foreclosed from utilizing the administrative remedy.

SUMMARY

In the past, Congress has frequently given administrative agencies the power to award remedial damages in a variety of disputes involving private persons, although the Government may be a formal party to the proceeding. On occasion, the alleged wrongdoer has challenged the constitutionality of such statutes on various grounds: right to jury trial, separation of powers, and conformity with Article III. In our time, the Supreme Court has never sustained such attacks. The highest courts of the states have also not been eager to strike down legislative enactments giving broad remedial authority to administrative agencies.

Although the case law in the federal courts is infused with "arcane distinctions and confusing precedents," Northern Pipeline, 458 U.S. at 90 (Rehnquist, J. concurring), the Supreme Court has focused on several critical fac-

tors in determining the constitutionality of such legislative schemes: (1) the degree to which the non-Article III tribunal exercises the "essential attributes" of judicial power we normally associate with Article III courts (e.g., authority to summon witnesses, hear evidence, impanel juries, enter final judgments, enforce orders, declare statutes unconstitutional, issue writs of habeas corpus, hold persons in contempt, etc.); (2) the nature of the claims and the forum to which the dispute is assigned; (3) the right and scope of judicial review in an Article III court; (4) the extent to which Congress has created the non-Article III forum to resolve controversies in "specialized areas having particularized needs and warranting distinctive treatment," Palmore, 411 U.S. at 408; and (5) the "concerns that drove Congress to depart" from the normal requirements of the Constitution. Schor, 106 S. Ct. at 3258.

If the administrative mechanism that S. 558 creates is measured against these criteria, its constitutionality is revealed. First, the administrative law judge does not have all the "essential attributes" of judicial power, exercising only a limited kind of judicial authority. While such judges, under S. 558, could hear and determine cases under Title VIII, they could not enforce their own orders, could not hold persons in contempt, and could not determine constitutional questions. Their limited authority is a far cry from the broad power exercised by Article III courts.

Second, the claims involved in this bill are "public rights," although the Constitution does not limit the jurisdiction of administrative agencies to such claims. As noted earlier in this statement, Congress may assign even "private rights" to such agencies. Further the forum created here is clearly part of an executive department, although independent of its head. To require the administrative law judges to hold jury trials would be incompatible with their role and place in our scheme of constitutional government.

Third, under S. 558, the person found to have violated Title VIII has a right of review in an Article III court, the United States Court of Appeals. The appellate court may review de novo all legal questions, including constitutional issues. Questions of fact are governed by the "substantial evidence" test which is the usual, well known, and permissible standard of appellate review for factual determinations by administrative agencies.

Fourth, the subject matter jurisdiction exercised by the administrative law judges is limited to questions arising under Title VIII. They cannot hear claims under related housing statutes, such as 42 U.S.C. § 1982, the various housing acts administered by the Department of Housing and Urban Development, or state law. This extremely limited jurisdiction contrasts sharply with the broad range and scope of the case-dispositive authority of Article III courts and the bankruptcy judges. Congress could well determine that housing discrimination disputes under Title VIII are "specialized areas having particularized needs and warranting distinctive treatment" through administrative resolution.

Finally, the reasons why Congress chose to assign the resolution of Title VIII cases to an administrative tribunal is an important factor in determining constitutionality. The Legislature might very well see the administrative process as more efficient, less expensive, and more expeditious than civil suits in the state or federal courts, whose dockets in many districts are nearly unmanageable. The Senate Judiciary Committee has for years sought ways to alleviate docket congestion in the federal courts, including the expansion of the magistrate system and limiting diversity jurisdiction. With case loads being what they are, Congress could well decide that the administrative process is one way of relieving the increased pressure on the courts as case filings mount. Such practical considerations of governance inform the judgment about constitutionality.

CONCLUSION

Based on the historical practices of Congress, the applicable Supreme Court precedents, and sound principles of constitutional interpretation, I conclude that the administrative enforcement mechanism in S. 558, including the provision for punitive damages, is well within the parameters of the United States Constitution.

78-076 O - 88 - 20

APPENDIX A

1. California Gov. Code Ann., Section 12987 (1985):

§ 12987. Findings and orders

If the commission, after hearing, finds that a respondent has engaged in any unlawful practice as defined in this part, the commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such practice and to take such actions, as, in the judgment of the commission, will effectuate the purpose of this part, including, but not limited to, any of the following:

(1) The sale or rental of the housing accommodation if it is still available, or the sale or rental of a like housing accommodation, if one is available, or the provision of financial assistance, terms, conditions, or privileges previously denied in violation of subdivision (f) of Section 12955 in the purchase, organization, or construction of the housing accommodation, if available.

(2) The payment of punitive damages in an amount not to exceed one thousand dollars ($1,000), adjusted annually in accordance with the Consumer Price Index, and the payment of actual damages.

(3) Affirmative or prospective relief.

However, no remedy shall be available to the aggrieved person unless the aggrieved person waives any and all rights or claims under Section 52 of the Civil Code prior to receiving a remedy, and signs a written waiver to that effect.

The commission may require a report of the manner of compliance.

If the commission finds that a respondent has not engaged in any practice which constitutes a violation of this part, the commission shall state its findings of fact and shall issue and cause to be served on the complainant an order dismissing the said accusation as to such respondent.

Any order issued by the commission shall have printed on its face references to the provisions of the Administrative Procedure Act which prescribe the rights of appeal of any party to the proceeding to whose position the order is adverse.

2. Minnesota Stat. Ann. (1987):

(a) Section 363. 071. Hearings

Subd. 2. Determination of discriminatory practice. The hearing examiner shall make findings of fact and conclusions of law, and if the hearing examiner finds that the respondent has engaged in an unfair discriminatory practice, the hearing examiner shall issue an order directing the respondent to cease and desist from the unfair discriminatory practice found to exist and to take such affirmative action as in the judgment of the examiner will effectuate the purposes of this chapter. Such order shall be a final decision of the department. The examiner shall order any respondent found to be in violation of any provision of section 363.03 to pay a civil penalty to the state. This penalty is in addition to compensatory and punitive damages to be paid to an aggrieved party. The hearing examiner shall determine the amount of the civil penalty to be paid, taking into account the seriousness and extent of the violation, the public harm occasioned by the violation, whether the violation was intentional, and the financial resources of the respondent. Any penalties imposed under this provision shall be paid into the general fund of the state. In all cases where the examiner finds that the respondent has engaged in an unfair discriminatory practice the examiner shall order the respondent to pay an aggrieved party, who has suffered discrimination, compensatory damages in an amount up to three times the actual damages sustained. In all cases, the examiner may also order the respondent to pay an aggrieved party, who has suffered discrimination, damages for mental anguish or suffering and reasonable attorney's fees, in addition to punitive damages in an amount not more than $6,000. Punitive damages shall be awarded pursuant to section 549.20. In any case where a political subdivision is a respondent the total of punitive damages awarded an aggrieved party may not exceed $6,000 and in that case if there are two or more respondents the punitive damages may be apportioned among them. Punitive damages may only be assessed against a political subdivision in its capacity as a corporate entity and no regular or ex officio member of a governing body of a political subdivision shall be personally liable for payment of punitive damages pursuant to this subdivision. In addition to the aforesaid remedies, in a case involving discrimination in

(a) employment, the examiner may order the hiring, reinstatement or upgrading of an aggrieved party, who has suffered discrimination, with or without back pay, admission or restoration to membership in a labor organization, or admission to or participation in an apprenticeship training program, on-the-job-training program, or other retraining program, or any other relief the examiner deems just and equitable.

(b) housing, the examiner may order the sale, lease, or rental of the housing accommodation or other real property to an aggrieved party, who has suffered discrimination, or the sale, lease or rental of a like accommodation or other real property owned by or under the control of the person against whom the complaint was filed, according to terms as listed with a real estate broker, or if no such listing has been made, as otherwise advertised or offered by the vendor or lessor, or any other relief the examiner deems just and equitable.

The examiner shall cause the findings of fact, conclusions of law, and order to be served on the respondent personally, the charging party by registered or certified mail, and shall furnish copies to the attorney general and the commissioner.

2. Minnesota Stat. Ann. (1987):

(b) Section 549.20. Punitive Damages

549.20. Punitive damages

Subdivision 1. Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety of others.

Subd. 2. Punitive damages can properly be awarded against a master or principal because of an act done by an agent only if:

(a) the principal authorized the doing and the manner of the act, or

(b) the agent was unfit and the principal was reckless in employing the agent, or

(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or

(d) the principal or a managerial agent of the principal ratified or approved the act.

Subd. 3. Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.

3. 23 Oklahoma Stat. Ann., Section 1505(b)(1987):

(b) If the Commission is unable to eliminate the discriminatory practice by conference, conciliation, or persuasion, it shall issue an order requiring the respondent to cease and desist from the discriminatory practice and to take such affirmative action as in the judgment of the Commission will carry out the purposes of this act. A copy of the order shall be delivered to the respondent, the complainant and the Attorney General.

(c) Affirmative action ordered under subsection (b) of this section may include but is not limited to:

(1) hiring or reinstatement of employees with or without back pay (less amount earned or earnable with reasonable diligence by such employees);

(2) admission or restoration of individuals to union membership, admission to or participation in a guidance program, apprenticeship training or retraining program, on-the-job training program, or other occupational training or retraining program, with the utilization of objective criteria in the admission of individuals to such program;

(3) admission of individuals to a public accommodation;

(4) reporting as to the manner of compliance;

(5) posting notices in conspicuous places in respondent's place of business in form prescribed by the Commission and inclusion of such notices in advertising material;

(6) as it relates to housing discrimination, ordering the person to pay the aggrieved party actual damages sustained by the aggrieved party;

(7) as it relates to housing discrimination, upon a determination that the violations of the provisions of this act were willful, wanton and oppressive, ordering the person to pay the aggrieved party punitive damages not to exceed: One Thousand Dollars ($1,000.00), if for a first violation; Two Thousand Dollars ($2,000.00), if for a second violation; or Five Thousand Dollars ($5,000.00), if for a third or subsequent violation;

(8) awarding costs, including attorneys' fees, to:

a. a prevailing complaining party, or

b. the party complained against, if the Commission determines that the complaint is clearly frivolous, or

c. the party complained against, if the district court determines that the complaint is frivolous and that the Commission dealt with the party complained against in a willful, wanton and oppressive manner, in which case, the Commission shall be ordered to pay such costs and attorneys' fees; and

(9) ordering a person to rehire, reinstate, and provide back pay to any employee or agent discriminated against because of obedience to the laws prohibiting discriminatory practices in housing.

APPENDIX B

SURVEY OF STATE FAIR HOUSING STATUTES

By Professor Arthur D. Wolf

Name of State	Fair Housing Statute	Agency Enforcement[1]	Remedial Damages[2]	Punitive Damages[3]
Alabama	None	---	---	---
Alaska	Yes	Yes	Yes	None
Arizona	None	---	---	---
Arkansas	None	---	---	---
California	Yes	Yes	Yes	Yes
Colorado	Yes	Yes	Yes	None
Connecticut	Yes	Yes	Yes	None
Delaware	Yes	Yes	Unclear	Unclear
Florida	Yes	None	---	---
Georgia	Yes	None	---	---
Hawaii	Yes	Yes	Yes	Unclear
Idaho	Yes	None	---	---
Illinois	Yes	Yes	Yes	Unclear
Indiana	Yes	Yes	Yes	None
Iowa	Yes	Yes	Yes	None
Kansas	Yes	Yes	Yes	None
Kentucky	Yes	Yes	Yes	None
Louisiana	Yes[4]	Yes	None	None
Maine	Yes	None	---	---
Maryland	Yes	Yes	None	None
Massachusetts	Yes	Yes	Yes	Unclear
Michigan	Yes	Yes	Yes	Unclear
Minnesota	Yes	Yes	Yes	Yes
Mississippi	None	---	---	---
Missouri	Yes	Yes	Yes	Unclear
Montana	Yes	Yes	Yes	None
Nebraska	Yes	None	---	---
Nevada	Yes	Yes	None	None
New Hampshire	Yes	Yes	None	Unclear
New Jersey	Yes	Yes	Yes	Unclear
New Mexico	Yes	Yes	Yes	Unclear
New York	Yes	Yes	Yes	None
North Carolina	Yes	None	---	---
North Dakota	Yes	None	---	---
Ohio	Yes	Yes	None	None
Oklahoma	Yes	Yes	Yes	Yes
Oregon	Yes	Yes	Yes	Unclear
Pennsylvania	Yes	Yes	None	Unclear
Rhode Island	Yes	Yes	Unclear	Unclear
South Carolina	None	---	---	---
South Dakota	Yes	Yes	Unclear	Unclear
Tennessee	Yes	Yes	Yes	Unclear
Texas	None	---	---	---
Utah	None	---	---	---
Vermont	Yes	Yes	Unclear	Unclear
Virginia	Yes	None	---	---

SURVEY OF STATE FAIR HOUSING STATUTES (cont.)

Name of State	Fair Housing Statute	Agency Enforcement[1]	Remedial Damages[2]	Punitive Damages[3]
Washington	Yes	Yes	Yes	Unclear
West Virginia	Yes	Yes	Yes	Unclear
Wisconsin	Yes	Yes	Unclear	Unclear
Wyoming	None	---	---	---
Totals:	Yes: 42 None: 8	Yes: 34 None: 8	Yes: 23 None: 6 Unclear: 5	Yes: 3 None: 13 Unclear: 18

FOOTNOTES

[1] In this column, "yes" means that an administrative agency or officer is authorized to receive and investigate complaints of housng discrimination, conduct hearings, and enter an appropriate order if a violation is found. "None" means either that the administrative agency does not have enforcement powers or that the state has not established an administrative agency to process such complaints.

[2] As used in this chart, "remedial damages" include any form of monetary relief (except punitive damages), which is designed to compensate the victim or make the victim whole for any injury suffered because of the discriminatory housing practice (e.g., actual losses, pain and suffering, humiliation, embarrassment, etc.). State statutes vary in phraseology and scope when authorizing administrative agencies to award such damages. They employ phrases such as "compensatory damages," "actual damages," or simply "damages." In other instances, state courts have interpreted general grants of remedial authority to permit such agencies to award damages; that case law continues to develop.

This column uses the word "unclear" where the statutory or case law in the human rights area does not unequivocably authorize or prohibit some form of remedial damages. Because state agency regulations were not uniformly available for examination and study, the chart does not reflect instances, if any, where an administrative regulation is the source of the authority to award remedial damages.

[3] This column uses the word "unclear" where the statutory or case law in the human rights area does not unequivocably authorize or prohibit punitive damages. Because state agency regulations were not uniformly available for examination and study, the chart does not reflect instances, if any, where an administrative regulation is the source of the authority to award punitive damages.

[4] The prohibition against housing discrimination in the Louisiana statute apparently applies only to real estate agents. It further appears that the only remedy for violating the statute is disciplinary action (censure or license suspension or revocation) by the Louisiana Real Estate Commission.

Senator SIMON. Thank you.
Mr. Paul Kamenar, of the Washington Legal Foundation.

STATEMENT OF PAUL KAMENAR

Mr. KAMENAR. Thank you, Mr. Chairman, members of the committee. Mr. Chairman, the last time we met we were debating each other on the CNN "Crossfire" show on the merits of whether Justice Rehnquist should be Chief Justice and I am glad that eventually I won that argument. I hope to do the same today.

I would like to thank you for the opportunity to be here today. I would like to note that our foundation did file an amicus curiae brief in the *Tull* case and we took the position that the seventh amendment did require a jury trial in that case, and the Supreme Court, of course, unanimously ruled that it did.

Now, it is our position that both the seventh amendment and the Supreme Court cases in *Tull* and *Curtis* v. *Loether* require that a jury trial be allowed or be required, actually, whenever there is an action at law, and this includes whether you are seeking civil penalties or damages.

Now, there are three enforcement mechanisms under S. 558. One is where there is a suit by the Attorney General in Federal court. The other is a suit by the aggrieved person in district court; and the final one is where the ALJ adjudicates the claim and then there is review in the circuit court.

The first two, I think there would be no doubt among anybody on this panel that a jury trial is required whenever the aggrieved person or the Attorney General sues under S. 558 in Federal district court. So two of the mechanisms do allow for the jury trial, there is no question.

The third is the controversy today, and that is whether the administrative law judge can basically short-circuit the right to the jury trial. We think that that is not permitted both under *Tull* v. the *United States* and *Curtis* v. *Loether*.

If you look at those two decisions, they both look at what the nature of the action is and the nature of the remedy. In *Tull* v. the *United States*, it says that whenever there was an action to recover a penalty or damages, that is an action at law, and therefore it is clear that a jury trial is required.

In *Curtis* v. *Loether*, which dealt with title VIII, with housing issues, it said very clearly that the nature of that remedy is not only an action at law, but one regarding housing is more like sounding in tort, which is again an action at law. Therefore, there is a dual support for our view that title VIII is an action at law and therefore requires a seventh amendment right to a jury trial.

The controversy seems to be centered around the meaning of the *Atlas Roofing* case, and I think if you look at the precise holding of that case, I do not think it can be stretched completely to cover what the other side is saying here.

In the first place, in *Atlas Roofing*, the company there sought circuit court review of the ALJ's decision, basically the same kind of mechanism that would normally be in S. 558. But what the *Atlas Roofing Co.* did not do was to simply sit back and wait until the

Secretary of Labor sued the company to recover the fine in district court.

If it had done that, that would have been the posture which the court would have been best presented with the case. It is our view that if the Secretary of Labor had sued to recover this ALJ fine, that would definitely mean that was action in debt, one at law, and therefore a jury trial would be required.

The other point I would like to make about distinguishing *Atlas Roofing*—I think Senator Thurmond put it well, and that is even if you accept *Atlas Roofing's* distinction between private rights and public rights, it is clear here that we are talking about private rights.

If you look at the bill itself, section 812(f)(2) talks about awarding of damages to an aggrieved person. Aggrieved person is statutorily defined in the bill to mean anyone who has been injured by the housing violation. I cannot imagine more of a private right than that, especially when we are talking about damages, and not in the OSHA context where we are talking about penalties.

Indeed, in the *Atlas Roofing* case, the company could have been cited for a violation even if no one were injured. If they simply had an unsafe working condition that was against the regulation, they could be fined a civil penalty. So at least there is more of a public right aspect there. I would think public rights are more like environmental laws, consumer laws, antitrust laws, which benefit the entire public.

This bill specifically refers to giving damages—not penalties, damages—to private persons, and to me that distinction is compelling. If you look at some of the cases that were just mentioned about past Supreme Court practice, the *NLRB* case that I think Senator Specter referred to dealt with back pay and reinstatement, which are classic actions in equity. Those are not actions at law.

Also, *Crowell* v. *Benson* dealt with an issue that related to admiralty, and again that is not an action at law, or traditionally has not been. Therefore, I do not think the past Supreme Court decisions would support that.

In conclusion, I would like to cite Prof. Roger Kirst from the University of Nebraska, who wrote an excellent law review article which I would like to submit for the record, if it has not been already submitted, entitled "Administrative Penalties and the Civil Jury: The Supreme Court's Assault on the Seventh Amendment."

He concludes by saying:

> The work of the Drafters of the Constitution and Bill of Rights should not be so lightly cast aside. They could not foresee how the new federal government would grow or how powerful it would become, but they were fearful of creating a national government that would reinstitute the abuses against which they had rebelled.
>
> The Constitution and the Bill of Rights provided for the separation of powers, limited judicial power of the courts, and, as far as possible, provided the protection of a jury trial. Congress may use its constitutional powers to expand the reach of the federal government and create federal agencies more powerful than ever imagined in 1789, but Congress cannot escape from the limitations of the Constitution or the Bill of Rights. Any less respect for the Seventh Amendment is a breach of faith.

Thank you, Mr. Chairman.

Senator SIMON. Thank you, and the full statement will be entered in the record.

[The prepared statement of Mr. Kamenar and the article by Professor Kirst follow:]

TESTIMONY

OF

PAUL D. KAMENAR

EXECUTIVE LEGAL DIRECTOR

WASHINGTON LEGAL FOUNDATION

Mr. Chairman and Members of the Subcommittee: My name is Paul D. Kamenar, Executive Legal Director of the Washington Legal Foundation. I wish to thank you for the invitation to testify on S. 558, the "Fair Housing Amendment Act of 1987." In particular we have been requested to testify on the Seventh Amendment jury trial ramifications of the bill.

The Washington Legal Foundation is a national nonprofit public interest law and policy center with over 85,000 members nationwide. WLF has litigated and appeared in numerous federal court cases dealing with constitutional and administrative law. We have represented over 200 Senators and Congressmen in many of these cases. With respect to the Seventh Amendment, we filed an amicus curiae brief in Tull v. United States, 107 S.Ct. 1831 (1987) recently decided by the Supreme Court which unanimously ruled that a jury trial was required whenever the government files a suit for civil penalities under federal law. In addition to our court cases, I am a member of the Administrative Conference of the United States, an advisory group which studies administrative practices and procedures and makes recommendations to the various agencies and to Congress. I am also an adjunct professor of law at Georgetown University Law Center.

The Seventh amendment to the Constitution provides that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." It is our position that under the Seventh Amendment and Supreme Court precedents, a respondent is entitled to a jury trial

whenever the government seeks civil penalties or damages for violations of federal law. Tull v. U.S., supra. In addition, where a private person files a lawsuit under Title VIII or if one were to be filed under the proposed amendments to Title VIII, a right to a jury trial would be afforded to the parties. Curtis v. Loether, 415 U.S. 1989 (1974).

Consequently, Section 814(e) of S. 558 which provides that the Attorney General can file suit in U.S. district court and seek civil penalities up to $50,000 for a first violation and up to $100,000 for any subsequent violation requires a jury trial under the Seventh Amendment. A civil suit filed by the aggrieved person under Section 813 in federal court seeking actual and punitive damages also must comport with the Seventh Amendment's protections. Curtis v. Loether, 415 U.S. 189 (1974); Pernell v. Southall Realty, 416 U.S. 363 (1974).

However, Section 812(f)(2) of S. 558 which allows an administrative law judge to determine actual and punitive damages, and subsection (i) which allows a circuit court of appeals to enforce the ALJ's order setting those damages, are unconstitutional to the extent that a jury trial is not provided.

There can be no doubt that where the Attorney General or the aggrieved party files suit in U.S. district court for alleged violations of Title VIII, that the parties have a right to a jury trial. As Justice Brennan, speaking for the Court in the Tull case, made clear, "[a]ctions by the Government to recover civil penalities under statutory provisions ... have been viewed

as one type of action in debt requiring trial by jury." Tull v. U.S., 107 S.Ct. at 1836. And as Justice Marshall declared for the unanimous court in Curtis v. Loether, suits brought under Title VIII for actual and punitive damages "is an action to enforce 'legal rights' within the meaning of our Seventh Amendment decisions." 415 U.S. at 195. Accordingly, while neither Section 813 (suits by an aggrieved person) nor Section 814 (suits by the Attorney General) make any reference to the right of a jury trial, such a right clearly exists and would be provided in those cases if so demanded by the parties.

The controversy of this bill with respect to a jury trial does not to center around Sections 813 or 814, but rather around Section 812 and the role of the administrative law judge ("ALJ"). Section 812 empowers an ALJ under subsection (f) to order unlimited actual and punitive damages. Unlike Section 814 which limits civil penalties to $50,000 for a first violation if suit is brought into Court with a right to a jury trial, the ALJ under Section 812 could impose unlimited damages. Subsections (i) and (f) permit the Secretary of HUD to petition the United States court of appeals for the circuit where the alleged housing discrimination took place, where the respondent resides, or the D.C. Circuit. The circuit court is empowered to enforce the order, including any restraining order as well as the award of actual and punitive damages.

It is our view that, based on the reasoning and holdings of Tull v. U.S. and Curtis v. Loether, a respondent in any such action would have a right to a jury trial notwithstanding the

role of the administrative law judge and the court of appeals provided in the bill. In other words, S. 558 does not expressly deny the right to trial, it attempts to undermine that right by providing for an administrative mechanism and judicial review procedure that would not functionally accommodate a jury trial. There are no juries that assist ALJ's in any agency nor are there juries in the courts of appeals. The question, therefore, is whether Congress can constitutionally short-circuit a person's right to a jury trial in such a manner. If Congress can do it in this context, then the right to a jury trial could be extinguished altogether by the Congress by merely authorizing ALJ's to adjudicate any matter under federal law with review limited to the court of appeals.

Those who believe that Congress can deny the right to a jury trial by merely having an administrative enforcement mechanism rely on the Supreme Court's decision in Atlas Roofing Co. v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1977). In our view, this position is wrong. In the first place, the company in Atlas Roofing sought review of the ALJ's decision finding of a safety violation and imposition of fine in the court of appeals as provided in the Occupational Safety and Health Act. If the company simply had refused to pay the fine and forced the Secretary of Labor to file a civil suit or collection action in federal district court, clearly that action would have been an action in debt and, under the teachings of Tull v. U.S., would have required a jury trial.

Instead, Atlas Roofing argued that the initial adjudication of their violations to "an administrative agency in which no jury is available" would allow Congress to defeat their right to a jury trial. 430 U.S. at 450. The Supreme Court disagreed stating:

> At least in cases in which "public rights" are being litigated -- e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact -- the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible. Id. (emphasis added).

Thus, the precise holding of Atlas Roofing is that a jury is not required at the administrative level, especially where this is only the "initial" adjudication. The Court did not hold that a jury trial could not be had if the Secretary of Labor filed suit to recover the fine. Nor did the Atlas Roofing court sanction ALJ's findings of legal liabilities, conclusions of law, or the setting of fines, but merely referred to the ALJ's "factfinding function."

In any event, to the extent that Atlas Roofing allows Congress to foreclose a right to a jury trial in a "public rights" case, even where the government goes into court to collect the fine, this reading of Atlas Roofing is incompatible with the Seventh Amendment and the Supreme Court's recent decision in Tull v. U.S.

In the first place, this "public rights" exception to the Seventh Amendment referred to in Atlas Roofing has no

constitutional roots and has been soundly criticized by Professor Roger W. Kirst, a noted Seventh Amendment expert at the University of Nebraska in a lengthy and historically accurate law review article "Administrative Penalties And The Civil Jury: The Supreme Court's Assault On The Seventh Amendment," 126 Univ. of Pa. L. Rev. 1281 (1978), a copy of which I would like to submit for the record. Professor Kirst's article describes the numerous flaws in the Atlas Court reasoning. For example, Professor Kirst correctly noted that the Atlas Court, in divining the meaning of the Seventh Amendment, ignored the earliest and therefore most relevant cases on the subject. Instead, the Court looked to cases decided only after 1856. Thus, in our view and that of Professor Kirst, a jury trial is required whenever the government seeks civil penalties, regardless of the artificial distinction between "public rights" "and "private rights."

Furthermore, Tull clearly stated that a right to a jury trial depends upon both the nature of the action and the type of remedy. Id. As for the nature of the action, the Tull Court stated, as noted previously, that the recovery of civil penalties is a type "of action in debt requiring trial by jury." 107 S.Ct. at 1836. In addition to being an action in debt, the underlying action in Title VIII dealing with the right to housing and accommodations is, as Justice Marshall noted, one at common law and not in equity. Curtis v. Loether, supra. Thus, the dual nature of the action in the Title VIII context underscores the legal rather than equitable nature of the action.

As for the second prong of the analysis, i.e., the nature of the remedy, the Tull Court stated that a "civil penalty was a type of remedy that could only be enforced in courts of law." Id. at 1838 (emphasis added). And as the Tull Court further noted "civil penalties is similar to the remedy of punitive damages, another legal remedy that is not a fixed fine." Id. at 1838, n. 7 (emphasis added).

If the Congress or the Courts can deny a constitutional right by merely characterizing the underlying right as a "public right," then the Seventh Amendment could be entirely eviscerated. The "public right" at issue in Atlas Roofing was the allegedly unsafe working conditions for construction workers. We think that the nature of the violation would be more aptly described as a "private right" since the public at large is not affected as they would be, for example, in the case of statutory violations of antitrust laws, or consumer protection laws. In those latter examples, the public as a whole is protected rather than a small class of persons such as construction workers.

Be that as it may, it seems still clearer that the rights to be protected under Title VIII are more characteristic of "private" rights rather than "public rights." For example, under Section 812(f)(2), the ALJ can only award damages "suffered by the aggrieved person." Section 800 defines "aggrieved person" as "any person who --

> (1) claims to have been injured by a discriminatory housing practice; or

> (2) believes that such person will be injured by a discriminatory housing practice that is about to occur

Thus, the right that may be compensated is one that is personal to the person injured, unlike an OSHA violation where a fine may be assessed even if no workers were found to be injured. Accordingly, even if the "public rights" versus "private rights" distinction in Atlas Roofing is valid, the nature of the compensable underlying right to be protected and compensable under Title VIII is a "private right" rather than a "public" one.

If, however, this right is regarded as a "public right," it is hard to imagine any right to a jury trial where the government is suing. This result would be particularly unfortunate since our Founding Fathers drafted the Seventh Amendment precisely as a protection of the citizen against the weight of the government. For as Justice Rehnquist noted in Parklane Hosiery Co. v. Shore, 439 U.S. 322, 344 (1979) (Rehnquist, J., dissenting)

> The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary.

For all of these reasons, we submit that a jury trial be recognized in this context of Title VIII just as it must be when either the private individual (under Section 813) or the Attorney General under Section 814 files suit in district court. At a minimum, we suggest that language be inserted in S. 558 or noted in the conference report to the effect that nothing

herein shall deprive any person a right to jury trial that they may otherwise have under the Seventh Amendment.

Congress, as a coordinate branch of the government, has an independent duty to ensure that constitutional rights are protected as does the Judiciary and the Executive. Accordingly, just as the Congress must be sensitive to F rst Amendment rights when enacting legislation, so too must it be sensitive to Seventh Amendment rights.

Thank you.

1978]

ADMINISTRATIVE PENALTIES AND THE CIVIL JURY: THE SUPREME COURT'S ASSAULT ON THE SEVENTH AMENDMENT

ROGER W. KIRST †

INTRODUCTION

The decision of the Supreme Court in *Atlas Roofing Co. v. Occupational Safety & Health Review Commission* [1] has seriously weakened the protection afforded by the seventh amendment to the United States Constitution.[2] In *Atlas* the Court considered the constitutionality of the enforcement procedure established by the Occupational Safety and Health Act (OSHA).[3] This was the first time the Court had considered a seventh amendment challenge to recent statutes in which Congress has expanded the role of administrative agencies in the enforcement of federal regulatory statutes.[4] The Court's conclusion that the OSHA procedure is not forbidden by the seventh amendment constitutes a first round of approval for this expansion.

The OSHA procedure gives an administrative agency more power than has been given to agencies enforcing most older federal regulatory programs. Violations of the Act are not criminal offenses, and the only sanction is a civil money penalty. Civil money penalties have been used in other regulatory statutes,[5] but OSHA pro-

† Associate Professor of Law, University of Nebraska. B.S. 1967, Massachusetts Institute of Technology; J.D. 1970, Stanford University.

[1] 430 U.S. 442 (1977). There were no dissents; Justice Blackmun did not participate in the decision.

[2] In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

[3] 29 U.S.C. §§ 651-678 (1970).

[4] Other examples besides OSHA include the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (1976) and the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-260 (1970 & Supp. V 1975).

[5] For a discussion of various considerations concerning the use of civil money penalties, see Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, in 2 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 896 (1973). *See generally* Abrahams & Snowden, *Separation of Powers and Administrative Crimes: A Study of Irreconcilables*, 1 S. ILL. U.L.J. 1 (1976); Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478 (1974); Gellhorn, *Administrative Prescription and*

vides a new collection procedure. In earlier statutes Congress had generally provided for one of two typical collection procedures: if the agency could enforce payment of a penalty by a denial or withholding of agency permission, the agency did not have to rely on the federal courts;[6] if Congress wanted the government to be able to collect the civil penalty with the enforcement powers available for collecting a court judgment, the agency had to enforce the penalty by a *de novo* civil action in federal court.[7] Under the enforcement procedure in OSHA, however, the agency lacks power to collect the penalty by administrative action alone, and therefore requires some assistance from the federal courts, but the action is not a *de novo* civil action and there is no need to relitigate the violation in district court.

The petitioners in *Atlas* challenged this procedure on the ground that it violated the seventh amendment by using the federal courts to enforce payment without also providing for a right to trial by jury. The Supreme Court found no constitutional objection; in an opinion by Justice White it held that the seventh amendment did not render the OSHA procedure invalid because there is an exception for "public rights" cases—"cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact."[8] That conclusion alone reduced the reach of the seventh amendment because the public rights exception had never before been explicitly recognized.

The significance of the *Atlas* decision extends beyond the OSHA procedure because the opinion appears to mark the start of a new approach to seventh amendment interpretation. *Atlas* is the seventh in a current series of decisions interpreting the seventh amendment,[9] but the analysis in *Atlas* does not follow the pattern of the other recent decisions. There is no attempt to follow the classic

---

Imposition of Penalties, 1970 WASH. U.L.Q. 265; Comment, *OSHA Penalties: Some Constitutional Considerations*, 10 IDAHO L. REV. 223 (1974); Comment, *The Imposition of Administrative Penalties and the Right to Trial by Jury—An Unheralded Expansion of Criminal Law?*, 65 J. CRIM. L. & C. 345 (1974); Note, 7 SETON HALL L. REV. 458 (1976).

[6] An example is the immigration statute considered in Oceanic Navigation Steam Co. v. Stranahan, 214 U.S. 320 (1909), *discussed in* text accompanying notes 85-91 *infra*.

[7] Goldschmid, *supra* note 5, at 907.

[8] 430 U.S. at 450.

[9] The other six were Pernell v. Southall Realty, 416 U.S. 363 (1974) (landlord-tenant disputes in the District of Columbia); Curtis v. Loether, 415 U.S. 189 (1974) (damage suits under the Civil Rights Act of 1968); Ross v. Bernhard, 396 U.S. 531 (1970) (stockholder derivative actions); Katchen v. Landy, 382 U.S. 323 (1966) (bankruptcy court); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) (complex actions and masters); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) (equitable cleanup doctrine).

doctrine that the scope of the seventh amendment is determined by reference to the common law of 1791.[10] Instead the opinion relies on Supreme Court precedents no earlier than 1856 to determine the correct interpretation of the seventh amendment, which is unusual. Moreover, the Court does not confidently assert that the cases from 1856 to 1977 accurately reflect the correct reading of the seventh amendment.

Atlas indicates that the Court is seeking more flexibility in the interpretation of the seventh amendment and is concerned that a strict interpretation will "choke the already crowded federal courts with new types of litigation" that would be better handled by "administrative agencies with special competence in the relevant field."[11] At the same time, however, the opinion indicates the Court is uneasy about an interpretation of the seventh amendment that would severely limit the protection of a guarantee found in the Bill of Rights. The burden of proceeding to demonstrate either that the earlier precedents were wrong or that the current Court is misreading the precedents is placed on the advocates of jury trial. In *Atlas* the petitioners did not convince the Supreme Court of either proposition, but the Court left open the possibility that further research and evidence might require the Court to reconsider its conclusion that the seventh amendment can be read less strictly.[12]

This Article will examine the *Atlas* opinion and the relevant history of the seventh amendment. The history is particularly important because *Atlas* demonstrates how easily a modern court can misinterpret the amendment if the analysis begins in the middle of the historical development. Section I analyzes *Atlas* at greater length. Section II discusses whether the seventh amendment can correctly be read as including a public rights exception. Section III considers the possibility of interpreting the *Atlas* decision to obtain a civil jury trial in an OSHA case by a procedure not discussed in *Atlas*. Section IV discusses the direction that this part of the seventh amendment debate may take in the future.

I. The *Atlas* Opinion

The petitioners in *Atlas* and in *Frank Irey, Jr., Inc. v. Occupational Safety & Health Review Commission*, its companion, had been

[10] The Court included a perfunctory mention of the classic doctrine, 430 U.S. at 449 (quoting Parsons v. Bedford, 28 U.S. (3 Pet.) 433 (1830)), but Justice White did not rely on this case in his analysis. For a discussion of this doctrine generally, see Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 639-42 (1973).

[11] 430 U.S. at 455.

[12] *Id.* 461 n.16.

assessed civil penalties by the Occupational Safety and Health Review Commission (OSHRC) for violations of OSHA mandatory occupational safety standards.[13] In each case an employee had died in a work related accident,[14] and the Secretary of Labor had inspected the employers' worksites and cited them for OSHA violations. After proceedings before an administrative law judge and a review by the OHSRC, Atlas was assessed a penalty of $600, and the Frank Irey Co., a co-petitioner, was assessed a penalty of $5000.[15] A succinct description of the statutory procedure under which these penalties were imposed was provided by Justice White in the *Atlas* opinion.[16] The seventh amendment is involved because "the penalty

---

[13] 430 U.S. at 447.

[14] In *Atlas* an employee died when he fell through an opening in the roof of an unfinished warehouse. The Atlas Roofing Company, his employer, was cited for violating OSHA regulations requiring roof openings to be adequately covered or railed off. Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 518 F.2d 990, 992-93 (5th Cir. 1975), *aff'd*, 430 U.S. 442 (1977).

In the companion case, Frank Irey, Jr., Inc. v. Occupational Safety & Health Review Comm'n, 519 F.2d 1200 (3d Cir.), *aff'd on rehearing en banc*, 519 F.2d 1215 (3d Cir. 1975), *aff'd sub nom.* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442 (1977), an employee was killed when the side of a seven and one half foot trench collapsed onto him. Irey, as his employer, was cited for a violation of OSHA for failing to slope or shore the sides of the trench. *Id.* 1201-02.

[15] 430 U.S. at 447-48.

[16] The Act created a new statutory duty to avoid maintaining unsafe or unhealthy working conditions, and empowers the Secretary of Labor to promulgate health and safety standards. Two new remedies were provided—permitting the Federal Government, proceeding before an administrative agency, (1) to obtain abatement orders requiring employers to correct unsafe working conditions and (2) to impose civil penalties on any employer maintaining any unsafe working condition. Each remedy exists whether or not an employee is actually injured or killed as a result of the condition, and existing state statutory and common-law remedies for actual injury and death remain unaffected.

Under the Act, inspectors, representing the Secretary of Labor, are authorized to conduct reasonable safety and health inspections. . . . If a violation is discovered, the inspector, on behalf of the Secretary, issues a citation to the employer fixing a reasonable time for its abatement and, in his discretion, proposing a civil penalty. . . . Such proposed penalties may range from nothing for *de minimis* and nonserious violations, to not more than $1,000 for serious violations, to a maximum of $10,000 for willful or repeated violations . . . .

If the employer wishes to contest the penalty or the abatement order, he may do so by notifying the Secretary of Labor within 15 days, in which event the abatement order is automatically stayed. . . . An evidentiary hearing is then held before an administrative law judge of the Occupational Safety and Health Review Commission. The Commission consists of three members, appointed for six-year terms, each of whom is qualified "by reason of training, education or experience" to adjudicate contested citations and assess penalties. . . . At this hearing the burden is on the Secretary to establish the elements of the alleged violation and the propriety of his proposed abatement order and proposed penalty; and the judge is empowered to affirm, modify, or vacate any or all of these items, giving due consideration in his penalty assessment to the size of the busi-

may be collected without the employer's ever being entitled to a jury determination of the facts constituting the violation." [17]

Neither Atlas nor Irey had been able to convince a court of appeals that the OSHA procedure deprived the employer of a seventh amendment right to jury trial. Atlas petitioned for review from the Fifth Circuit Court of Appeals; the Fifth Circuit affirmed the order of the Commission in an opinion that rejected both the challenge to the factual finding of a violation and the challenge to the constitutionality of the procedure.[18] Irey obtained review of the order before the Third Circuit. A panel opinion upheld the OSHA procedure; on rehearing *en banc* the full court also held the OSHA procedure was constitutional.[19] A vigorous dissenting opinion by Judge Gibbons, joined by three colleagues, argued that the procedure did violate the seventh amendment.[20]

In both *Atlas* and *Irey* the petition for certiorari raised questions concerning article III and the fifth and sixth amendments, as well as the jury trial clause of the seventh amendment.[21] The

---

ness of the employer . . . , the gravity of the violation, the good faith of the employer, and the history of previous violations." . . . The judge's decision becomes the Commission's final and appealable order unless within 30 days a Commissioner directs that it be reviewed by the full Commission. . . .

If review is granted, the Commission's subsequent order directing abatement and the payment of any assessed penalty becomes final unless the employer timely petitions for judicial review in the appropriate court of appeals. . . . The Secretary similarly may seek review of Commission orders . . . but, in either case, "[t]he findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive." . . . If the employer fails to pay the assessed penalty, the Secretary may commence a collection action in a federal district court in which neither the fact of the violation nor the propriety of the penalty assessed may be retried. . . . Thus, the penalty may be collected without the employer's ever being entitled to a jury determination of the facts constituting the violation.

Id. 445-47 (footnotes and citations omitted).

[17] *Id.* 447.

[18] Atlas argued that the opening had been covered—by two bundles of the insulation material the employee was putting on the roof; the administrative law judge had held that the bundles were not "so installed as to prevent accidental displacement." 518 F.2d at 993.

[19] The decision of the Commission was vacated and remanded for further consideration because the administrative law judge had used an incorrect definition of a "willful" violation; without so holding, the opinion indicated that the violation was at most "serious," for which the maximum civil penalty was $1000 instead of $10,000. The Irey superintendent had testified that he thought the trench had been dug in shale and did not have to be shored; the technical data on the nature of the soil was unclear. 519 F.2d at 1201, 1206-07 & n.16.

[20] 519 F.2d at 1219 (Gibbons, Aldisert, and Hunter, JJ., dissenting from *en banc* opinion); *id.* 1228 (Garth, J., concurring in part in Judge Gibbons' dissent). *See also id.* 1207 (Gibbons, J., dissenting from panel opinion).

[21] "1. Whether the procedures set up by the Occupational Safety and Health Act of 1970 for administrative enforcement of the Act's civil penal-

Supreme Court granted certiorari only on the seventh amendment question.[23] Therefore, the Court in *Atlas* assumed that the money penalties were civil and not criminal and did not discuss the separation of powers issue.

Before the Supreme Court, Atlas and Irey argued that suits by the federal government for a civil penalty were suits for a money judgment, always considered suits at common law within the meaning of the seventh amendment.[24] Therefore, such a suit in federal court would be subject to the seventh amendment's guarantee of the right to trial by jury. Petitioners argued that Congress could not divide the adjudication, review, and collection powers between the courts and an administrative agency as it had done in OSHA, because the OSHA procedure deprived a defendant of any chance for a jury determination whether the Act had been violated.[25] Petitioners' brief surveyed the historical evidence in an attempt to demonstrate that the seventh amendment was intended to require a jury trial in all civil penalty cases.[26]

The government presented three arguments in support of the OSHA procedure: [27] (1) the seventh amendment does not apply to any kind of action in any forum in which the government is a party; (2) Congress has discretion to create an administrative procedure to adjudicate certain cases without a jury trial; and (3) the seventh amendment is not applicable to OSHA proceedings because OSHRC is a specialized court of equity under the doctrine of *Katchen v. Landy*.[27] The Court expressly declined to consider the first proposi-

ties and administrative definition of the Act's proscriptions violate Article III and the Fifth, and Sixth Amendments to the Constitution because the "civil penalties" and administrative enforcement mechanism are "penal" in nature and effect but omit the constitutional protections required in penal proceedings, including trial by jury.

2. Assuming *arguendo* that such civil penalties and enforcement procedures are civil in nature and effect, whether such procedures deny the defendant employer his right to jury trial guaranteed by the Seventh Amendment to the Constitution.

Petitioner's Petition for a Writ of Certiorari at 3, Irey v. Occupational Safety & Health Review Comm'n, 519 F.2d 1200 (3d Cir.), *aff'd on rehearing en banc*, 519 F.2d 1215 (3d Cir. 1975), *aff'd sub nom.* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442 (1977); Petitioner's Petition for a Writ of Certiorari at 2-3, Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n. Both petitioners were represented by the same counsel.

[23] 424 U.S. 964 (1976).

[24] Brief for Petitioners at 17, 32-42.

[25] *Id.* 44, 45, 61.

[26] *Id.* 20-31.

[27] Brief for Respondent at 17-19.

[28] 382 U.S. 323 (1966).

tion,[28] and the opinion did not discuss the third. The second argument, however, developed the analysis the Court used to sustain the OSHA procedure.

The Court in *Atlas* rejected the claim that the OSHA procedure violated the seventh amendment and stated a new rule to explain why the right to a jury trial does not apply to administrative proceedings:

> At least in cases in which "public rights" are being litigated—*e.g.*, cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.[29]

The public rights rule had to be created to decide the *Atlas* case; it is not the holding of any earlier opinion. In the remainder of the *Atlas* opinion, Justice White explained the precedents that supported the new rule and rebutted petitioners' specific arguments. The explanation of the precedents makes clear that the new rule is a conclusion reached from interpretation of several cases, none directly on point but all presumably sufficiently relevant to provide helpful authority. Justice White supported the *Atlas* rule with two basic lines of precedent: (1) six tax, tax penalty, and customs and immigration penalty cases;[30] and (2) excerpts from what is mostly dicta from five unrelated opinions, including the Court's two most recent seventh amendment opinions, *Curtis v. Loether*[31] and *Pernell v. Southall Realty*.[32]

---

[28] 430 U.S. at 449 n.6. The government's argument was based on semantics, not precedent, and would have astonished the drafters of the Constitution and the Bill of Rights. Hopefully it will never be made again.

[29] *Id.* 450 (footnote omitted).

[30] Helvering v. Mitchell, 303 U.S. 391 (1938) (tax penalties); Lloyd Sabaudo Societa v. Elting, 287 U.S. 329 (1932) (customs and immigration penalty); Phillips v. Commissioner, 283 U.S. 589 (1931) (taxes); *Ex Parte* Bakelite Corp., 279 U.S. 438 (1929) (dictum on taxes in opinion discussing court of customs appeals); Oceanic Navigation Steam Co. v. Stranahan, 214 U.S. 320 (1909) (customs and immigration penalty); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272 (18 How.) 272 (1856) (listed by the Court as a tax case; for a contrary interpretation, see text accompanying notes 111-13 *infra*).

[31] 415 U.S. 189 (1974).

[32] 416 U.S. 363 (1974). The Court also relied on NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), Crowell v. Benson, 285 U.S. 22 (1932), and Block v. Hirsh, 256 U.S. 135 (1921).

The first line of cases requires the more careful consideration because it provides the core support for the *Atlas* rule. Justice White concluded from the six cases that:

> Congress has often created new statutory obligations, provided for civil penalties for their violation, and committed exclusively to an administrative agency the function of deciding whether a violation has in fact occurred. These statutory schemes have been sustained by this Court, albeit often without express reference to the Seventh Amendment.[83]

That conclusion appeared to refute petitioners' argument that the government may collect a civil penalty only by a common law action in a federal court subject to the seventh amendment right to trial by jury. The Court assumed, without discussion, that such power in tax, tax penalty, and customs and immigration penalty cases implied power to use administrative factfinding in a broader category of public rights cases. The Court further assumed, and so stated, that the earlier decisions that the courts did not have to be involved in the factfinding process in the first instance supported the proposition that the seventh amendment did not require a jury trial at any stage of the proceedings.[84] Neither assumption is self-evident; similarly, the assumption that all six cases correctly interpreted the seventh amendment is questionable. An analysis of the application of the seventh amendment to those cases will be developed later in this Article.[85]

The second line of cases provides even weaker support for the *Atlas* rule, because it is primarily based on dicta and observations.[86] Although these five cases may not support the *Atlas* rule, they help explain the reasoning behind the *Atlas* opinion. The treatment of *NLRB v. Jones & Laughlin Steel Corp.*[87] is particularly important.[88] Although it had been ignored by the Court in seventh amendment cases for 37 years, the precedent of *Jones & Laughlin* was revived by Justice Marshall in both seventh amendment opinions he wrote in 1974—*Curtis v. Loether* and *Pernell v. Southall Realty*. In *Atlas*, Justice White relied on the interpretation of *Jones & Laughlin* announced by Justice Marshall in *Curtis* and *Pernell*. Justice White

[83] 430 U.S. at 450.

[84] *Id.* 456.

[85] See text accompanying notes 61-114 *infra*.

[86] *Id.* 456.

[87] 301 U.S. 1 (1937).

[88] See 430 U.S. at 453-54.

declared that these 1974 opinions had established the "proposition that when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible without violating the Seventh [Amendment]." [39] This use of *Curtis* and *Pernell* provides a clue to the reasoning of the Justices and indicates an important doctrinal shift in seventh amendment cases.

The reliance on *Curtis* and *Pernell* in *Atlas* indicates that *Atlas* is the next step in the Court's process of reevaluating the recent seventh amendment decisions. Although both earlier cases held that a jury trial was required in the particular circumstances, the opinions written by Justice Marshall pointedly discussed issues unnecessary to the particular case. In *Curtis*, Justice Marshall rejected the claim that *Jones & Laughlin* had established that all new statutory rights were outside the scope of the seventh amendment, and explained that *Jones & Laughlin* "merely stands for the proposition that the Seventh Amendment is generally inapplicable in administrative proceedings." [40] That statement was sufficient to explain the inapplicability of *Jones & Laughlin* to the *Curtis* facts, an action in federal district court for damages under the Civil Rights Act of 1968. Justice Marshall did not stop there, but went further, and described *Jones & Laughlin* and other cases as "uphold[ing] congressional power to entrust enforcement of statutory rights to an administrative process or specialized court of equity free from the strictures of the Seventh Amendment." [41]

Two months after the Court's decision in *Curtis*, Justice Marshall repeated the dictum in *Pernell*, and expanded the interpretation of *Jones & Laughlin*. After several pages of historical analysis establishing that a landlord-tenant eviction action in the District of Columbia was a suit at common law within the meaning of the seventh amendment, Justice Marshall considered the reasoning of the court of appeals in the decision below. The lower court had interpreted one precedent, *Block v. Hirsh*,[42] as establishing that no landlord-tenant suit is within the scope of the seventh amendment because *Block* had upheld the constitutionality of a rent control commission. Justice Marshall found the circuit court's reasoning incorrect because the suit in *Pernell* was in the superior court, not before a commission, and "Block v. Hirsh merely stands for the principle that the Seventh Amendment is generally inapplicable in

[39] *Id.* 455.

[40] 415 U.S. at 194.

[41] *Id.* 195.

[42] 256 U.S. 135 (1921). See notes 116-22 *infra* & accompanying text.

administrative proceedings . . . ."[43] That discussion and the preceding historical analysis was more than sufficient to support the conclusion that a jury trial was required in the superior court, but the opinion included further dictum: "We may assume that the Seventh Amendment would not be a bar to a congressional effort to entrust landlord-tenant disputes, including those over the right to possession, to an administrative agency."[44] Congress had not taken that possible step; nevertheless Justice Marshall included this advice on how to evade the seventh amendment.

For four years the dicta written by Justice Marshall in *Curtis* and *Pernell* has invited a response, but no commentator has challenged the assumption that Congress may so easily substitute factfinding by an administrative agency for trial by jury. The use of this dicta in *Atlas* to support the newly created public rights exception requires that it be ignored no longer; the opinions of Justices White and Marshall implicitly request further analysis.

The pattern of *Curtis*, *Pernell*, and *Atlas* suggests that at least Justices White and Marshall believe that serious review of the recent trend of seventh amendment cases is called for. Five of the six cases prior to *Atlas* held that a jury trial was required;[45] only in *Katchen v. Landy*[46] did the Court hold that an action was not a suit at common law within the terms of the seventh amendment. The effect of the other cases was necessarily an increase in the number of cases in which a jury could be demanded as a constitutional right by civil litigants. *Beacon Theaters, Inc. v. Westover*[47] and *Dairy Queen, Inc. v. Wood*[48] held that the merger of law and equity could have the effect of permitting a litigant to demand a jury trial on legal issues which previously would have been tried without a jury because of the equitable cleanup doctrine. *Ross v. Bernhard*[49] held that a jury trial could be demanded if the suit could be handled as a law action, even though the particular

---

[43] 416 U.S. at 383.

[44] *Id.*

[45] Pernell v. Southall Realty, 416 U.S. 363 (1974); Curtis v. Loether, 415 U.S. 189 (1974); Ross v. Bernhard, 396 U.S. 531 (1970); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). In the most recent opinion on the right to jury trial, the Court, in an opinion by Justice Marshall, held that there is a right to jury trial for actions under the Age Discrimination in Employment Act; Justice Marshall discussed only the statutory issue even though the Fourth Circuit had also found a seventh amendment right. Lorillard, A Division of Loew's Theatres, Inc. v. Pons, 98 S. Ct. 866 (1978).

[46] 382 U.S. 323 (1966).

[47] 359 U.S. 500 (1959).

[48] 369 U.S. 469 (1962).

[49] 396 U.S. 531 (1970).

mechanism through which the suit was presented had been developed by the equity side and considered equitable. Then *Curtis* held that new actions created by Congress would be within the scope of the seventh amendment if the statute created legal rights and remedies enforceable by an action for damages in the federal district court.[60]

The cases from 1959 to 1974 interpreted the seventh amendment in a manner that produced a ratchet effect on the requirement of a civil jury. The number and type of cases requiring a jury were always increased, never decreased, as the merger of law and equity and improvements in civil procedure made an adequate remedy at law possible in a greater proportion of cases. During the same years the use of the jury in civil cases came under serious attack by commentators and judges.[61] The opinions in *Curtis* and *Pernell* may reflect the concern of the Court, or at least that of Justice Marshall, that it was expanding the scope of the seventh amendment at a time when many powerful voices were calling for the elimination of the civil jury or at least its curtailment. *Curtis* and *Pernell* reflect an awareness of the divergence between the Court's opinions and legal commentary. The dicta appears to be a tentative search for a way, short of amending the seventh amendment, to reverse the earlier trend and restrict the use of the civil jury, if contemporary needs made that the best public policy. The dicta thus suggest a rationale that would permit Congress to counter the trend of the Supreme Court's opinions. Congress could, for a class of cases not yet defined, create an adjudicatory body not subject to the seventh amendment, even though in most other respects it resembled a court. Presumably other constitutional guarantees would still apply to that body, so that it would have to afford due process and not conflict with the separation of powers limits of article III.

---

[60] 415 U.S. at 194.

[61] *E.g.*, Devitt, *Federal Civil Jury Trials Should Be Abolished*, 30 A.B.A.J. 570 (1974); Landis, *Jury Trials and the Delay of Justice*, 56 A.B.A.J. 950 (1970); Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 Nw. U.L. Rev. 486, 502-08 (1975); Steuer, *The Case Against the Jury (A Brief Without Citations)*, 47 N.Y.S. B.J. 101 (1975). *See also* Schaefer, *Is the Adversary System Working in Optimal Fashion?*, 70 F.R.D. 159, 159-65 (1976); Stanley, *The Resolution of Minor Disputes and the Seventh Amendment*, 60 Marq. L. Rev. 963 (1977).

The attacks were not new, but by 1974 Justice Black, one of the most consistent advocates of jury trial in past decades, was no longer on the Court. *See* Green, *Jury Trial and Mr. Justice Black*, 65 Yale L.J. 482, 488-94 (1956). *Cf.* Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 Fordham L. Rev. 227, 229 n.3 (1973) ("There is no significant pressure to adopt the English non-jury system [for civil cases] and I do not advocate it.").

Justice Marshall's stated assumption in *Pernell* seemed to fit the facts of *Atlas* very well; the absence of any response to the assumption allowed Justice White to take the next step of converting the dicta of *Curtis* and *Pernell* into the holding of *Atlas* that Congress could create an administrative agency to adjudicate OSHA civil violations without any provision for a jury trial. In *Atlas*, Justice White clearly attempted to make the case for eliminating the jury as strong as the precedents of the last 120 years would allow, but the opinion itself implies that Justice White recognized that the analysis supporting the holding was not exhaustive. The opinion, explained the Court, was following the earlier "holdings or dicta" and the recent observations of *Pernell* and *Curtis*, because "none of the grounds tendered for so reinterpreting the Seventh Amendment is convincing." [52]

The *Atlas* Court found three separate arguments raised by petitioners unconvincing. The first was petitioners' historical argument that some of the early cases had not expressly decided the seventh amendment issue.[53] The point was accurate but not persuasive; some of the cases did discuss the seventh amendment in upholding administrative factfinding.[54] The second ground rejected was the argument that all the precedents dealt "with the exercise of sovereign powers that are inherently in the exclusive domain of the Federal Government and critical to its very existence" [55]—cases involving immigration, customs, and taxation. Justice White rejected this argument because none of the earlier opinions had stated such a limitation, and some precedents, such as *Jones & Laughlin*, were not within the suggested limitation.[56] Finally, Justice White discussed the objection that congressional power to require litigation in an administrative agency would allow Congress to destroy the right to a jury trial by defining the appropriate forum for the resolution of disputes.[57] He found the argument "well put" but "unpersuasive," because Congress could allow administrative factfinding not covered by the seventh amendment only in "public rights" cases.[58] The flaw in this defense of the *Atlas* rule cannot be attributed to any particular point in the argument; rather the funda-

[52] 430 U.S. at 456.

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.* 456-57.

[57] *Id.* 457.

[58] *Id.* 457-58.

mental weakness is that the defense is nothing more than a collection of minor points supported by scattered quotations and assumptions.

The conclusion reached in the *Atlas* opinion reaffirmed that the Court was not determining all constitutional objections to the OSHA procedure, but only whether the OSHA statute conflicted with the seventh amendment right to a jury trial. The Court's conclusion did make clear that the seventh amendment issue had been decided in accordance with what recent opinions seemed to indicate was the "settled judicial construction" "from the beginning." [59] The Court intimated that it might reconsider the wisdom of the *Atlas* precedent in a final footnote that declared that "this Court has the final decision on the question whether a jury is required." [60] Thus, the debate is still alive if additional arguments are presented and supported by the defenders of the civil jury.

II. Is There a Public Rights Exception to the Seventh Amendment?

The argument of the petitioners in *Atlas* that the civil penalty action created in OSHA was a suit at common law under the seventh amendment [61] was not supported by any controlling precedent. Instead, the argument rested on the classic constitutional doctrine that the federal government has three distinct branches, each limited to the exercise of specifically granted powers. The adjudication of controversies is vested in the courts by article III, and in civil cases the federal courts are subject to the seventh amendment. The OSHA procedure was neither in equity nor in admiralty; therefore it had to be equivalent to "a suit for a money judgment which is classically a suit at common law." [62]

The Court rejected petitioners' analysis as incomplete because it did not account for all the methods the government had been permitted to use to collect the equivalent of a money judgment. The precedents were interpreted as establishing that the Constitution allowed administrative factfinding and adjudication in tax collection and related cases.[63] The cases allowed the government to collect money without a jury and without using any procedure that resembled a classic suit at common law. Therefore, the Court con-

[59] *Id.* 460.

[60] *Id.* 461 n.16.

[61] Brief for Petitioners at 17, 34-38.

[62] 430 U.S. at 449.

[63] *Id.* 455.

78-076 O - 88 - 21

cluded there was an exception to the seventh amendment for a class of public rights cases.

The administrative precedents developed in tax, tax penalty, and customs and immigration cases, however, provide only apparent support for a public rights exception to the seventh amendment. When the precedents are traced back to find the authority and reasoning supporting such administrative factfinding, a single basis emerges as the foundation of the rules stated in all later cases. That basis is that taxes were assessed and collected by an executive or administrative agency without judicial involvement in the colonies and in England before the adoption of the Constitution and the seventh amendment, and by the state and federal governments after 1791. The Court assumed that the practice of administrative tax collection and consistent judicial approval of that practice allows Congress to authorize administrative enforcement procedures in other kinds of cases without violating the seventh amendment.[84]

By relying on opinions from 1856 and later, instead of tracing the tax collection precedents back to 1791, the Court increased the chance that the interpretation of the seventh amendment would be inaccurate. Because the Court commenced its historical research in the middle rather than at the beginning, careful distinctions developed by the earlier judges were not recognized or understood and overstated dicta were accorded more authority than was proper. The careless use of precedent permitted the Court to declare that the cases upholding administrative factfinding in certain situations subsumed the general proposition that a jury trial is not required by the seventh amendment in public rights cases. This section will address three questions: whether the seventh amendment exception for tax collection can be expanded to include the collection of a penalty (subsection A); whether the Court correctly interpreted *Murray's Lessee v. Hoboken Land & Improvement Co.*[85] as establishing a public rights exception to the seventh amendment (subsection B); and whether the modern dicta have created an exception to the seventh amendment unknown in 1791 (subsection C).

A. *Can Tax Collection Procedures Be Used to Collect a Penalty?*

The constitutionality of collecting federal taxes by nonjudicial methods is supported by solid authority. The typical eighteenth century collection procedure allowed the collector to seize or distrain the property of the tax debtor and then to sell the property to obtain

[84] *Id.* 458-60.

[85] 59 U.S. (18 How.) 272 (1856).

the money to satisfy the taxes; the method was nonjudicial and did not involve the courts at any stage from assessment to collection. Collection of a federal duty by distress and sale was authorized by Congress soon after the United States was formed.[66] The first exercise of the taxing power, the carriage duty of 1794, provided that unpaid duties and commissions could be collected either by suit in any federal or state court, or by distress and sale of the goods and chattels of the defaulting taxpayer.[67] Although the anti-Federalists brought a test case [68] in an attempt to block Hamilton's plans, there was no attack on the authority to collect by distress and sale.[69] Collection by distress and sale was not considered an improper procedure for collection of federal taxes because it had been used since the Elizabethan poor law of 1601. This procedure was part of the English land tax of 1689, and it had been used in the colonies as a common procedure.[70]

The often-stated reason for allowing nonjudicial collection of taxes was the absolute necessity that the government be able to collect quickly the revenue needed for operating;[71] therefore, the courts did not interfere with the collection by an administrative agency. Article III did not require collection by the slow processes of the courts,[72] and the seventh amendment did not apply because there was no common law action. Fines and penalties need not be collected so quickly because the purpose of the fine or penalty is to control conduct or punish offenses and only more incidentally to raise revenue. It may be difficult at times to determine whether a particular exaction is a penalty or a tax, but the distinction must be made if the seventh amendment is to be correctly applied. In *Atlas* the exaction had been labelled a civil penalty rather than a tax and the court consistently referred to it as a penalty and not as a tax.

The distinction between taxes and penalties was observed in the early federal statutes. The first customs acts allowed summary seizure of goods for non-payment of duties, but penalties could be

---

[66] *E.g.*, Act laying duties upon Distilled Spirits, ch. 15, § 23, 1 Stat. 190, 204 (1791).

[67] Act laying duties upon Carriages for the Conveyance of Persons, ch. 45, § 5, 1 Stat. 375 (1794).

[68] Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796).

[69] The government sued to collect the tax by an action of debt, the alternative method of collection established by the statute.

[70] See text accompanying notes 156-229 *infra*.

[71] *See* R. BLACKWELL, POWER TO SELL LAND FOR THE NONPAYMENT OF TAXES 29-30 (2d ed. 1864).

[72] Waldron v. Lee, 38 Mass. (5 Pick.) 323, 327-28 (1837).

collected only by a civil action in a court.[73] There are no early federal precedents establishing that Congress cannot use the tax collection procedure to collect a penalty, because Congress never tried to do so; the statutory provision for a civil action included a statutory right to a jury trial,[74] and hence there was no seventh amendment issue.

The application of the seventh amendment was an issue in proceedings to forfeit property for violations of the federal revenue laws.[75] Forfeiture proceedings were a major source of discontent in the colonies before the Revolution. In England such matters were heard by the Exchequer, but there was no Exchequer in the colonies,[76] and the early cases were handled as ordinary civil actions in the colonial courts with a trial by jury. Often colonial juries found no violation justifying forfeiture even though the evidence was clear; eventually the problem became too great to be ignored. The English solution was to place such cases under the jurisdiction of the expanded system of vice admiralty courts in which jury trial was not used.[77] The absence of a jury in these courts was one of the major complaints voiced by the colonists.

Colonial history was of primary importance in early Supreme Court cases determining the proper application of the seventh amendment to forfeiture proceedings. In *United States v. La-Vengeance*,[78] the Court ruled on a forfeiture of a schooner seized for carrying contraband. The Court held that the forfeiture was *in rem* against the property only; the forfeiture did not impose a personal penalty on the owner,[79] so it was a civil action and not a criminal action. The Court held that an action to forfeit property seized on navigable water was an action in admiralty. The seventh amend-

[73] *E.g.*, Act of Aug. 4, 1790, ch. 35, § 67, 1 Stat. 176 (penalties sued for and recovered in any court proper to try the same; anything forfeited for nonpayment of duties to be seized and libeled); Act of July 31, 1789, ch. 5, § 36, 1 Stat. 47 (same). *See also* Act of June 5, 1794, ch. 45, §§ 5, 6, & 10, 1 Stat. 375 (carriage duty collected by suit in any court or by distress and sale; fines, penalties, and forfeitures to be sued for in any court).

[74] An Act to establish the Judicial Courts of the United States, ch. 20, §§ 9 & 12, 1 Stat. 73 (1789).

[75] Much of the historical background is recounted in C.J. Hendry Co. v. Moore, 318 U.S. 133 (1943) and People v. One 1941 Chevrolet Coupe, 37 Cal. 2d 283, 231 P.2d 832 (1951).

[76] The writs of the Court of Exchequer in London did not run in the colonies. D. CLARK, THE RISE OF THE BRITISH TREASURY 174-75 & n.38 (1960). A separate exchequer court was never created for the colonies.

[77] C. UBBELOHDE, THE VICE ADMIRALTY COURTS AND THE AMERICAN REVOLUTION 75-77 (1960); *see* 4 C. ANDREWS, THE COLONIAL PERIOD OF AMERICAN HISTORY 168-71, 254-69 (1938).

[78] 3 U.S. (3 Dall.) 297 (1796).

[79] *Id.* 301.

ment did not require juries for forfeitures in admiralty [80] because the admiralty exception to the seventh amendment was grounded in the history before the Constitution and the practice that continued unchanged after the Constitution. In later cases the Court held that the admiralty exception would not be expanded to include all forfeitures; an action to forfeit property seized on land was an action at common law, subject to the right to trial by jury [81] because that had been the practice in such cases in Exchequer.

The tax collection procedures were not used to collect penalties,[82] and the admiralty exception did not extend to non-admiralty penalties because there was no history of such practices before 1791. Thus the early penalty and forfeiture cases affirm that the seventh amendment guaranteed a jury trial in every action at common law, unless pre-1791 precedent established an exception for a particular procedure. There was no procedure in the pre-1791 practice at all analogous to that in OSHA, so there can be no specific precedent to support an OSHA exception to the seventh amendment.

Even though there is no specific precedent for an OSHA exception, Justice White upheld the OSHA procedure under a general public rights exception. Even though there is no evidence that anyone in 1791 understood there was such an open-ended exception, several cases were presented in *Atlas* to support such an exception. The cases do not establish that the public rights exception ought to be considered part of the history of the seventh amendment; instead they show that the 1791 distinction between penalties and taxes has not always been observed. This has resulted in an expanding number of exceptions to the seventh amendment through misuse of the tax collection precedents. The customs and immigration penalty cases on which Justice White relied in *Atlas* illustrate the erosion of the seventh amendment by a gradual process in which a combination of false assumptions, misunderstood distinctions, and inaccurate dicta resulted in a misinterpretation of the seventh amendment.

The starting point for the trail of false turns was the opinion in *Bartlett v. Kane*,[83] a challenge by an importer to the administrative

---

[80] *Id.* *See also* United States v. Schooner Betsey and Charlotte, 8 U.S. (4 Cranch) 443 (1808); United States v. Schooner Sally, 6 U.S. (2 Cranch) 406 (1805).

[81] United States v. Winchester, 99 U.S. 372, 374 (1879); The Sarah, 21 U.S. (8 Wheat.) 391, 394 (1823) (dictum).

[82] *See* State v. Allen, 13 S.C.L. (2 McCord) 55 (1822) ("tax" of $10,000 on lottery office held to be a penalty; tax collector prohibited from enforcing his execution for the tax). *Cf.* Cowles v. Brittain, 9 N.C. 204 (1822) (sheriff may use distress and sale to collect penalty of $100 for peddling without a license; the peddler had refused to pay $10 required for a license).

[83] 57 U.S. (16 How.) 263 (1853).

collection of customs duties. The dispute in *Bartlett* was between the importer and collector over the value of the imported merchandise; the importer objected to the valuation made by appraisers and sought to have the valuation determined independently in federal court in an action for refund of duties paid. The appraisers had determined the value of the goods to be more than that declared by the importer, so that he had to pay duty on the higher value and an additional twenty percent as a penal duty for the undervaluation. The importer had not followed the procedure for review of the appraisal provided by the statute;[84] instead he brought the action for a refund. The Supreme Court held that the importer could not obtain a new determination of value in the federal court action and that the value found by the appraisers was binding. That result was unexceptional and caused no encroachment on the seventh amendment, because the appraisers were collecting a federal tax by an accepted nonjudicial procedure. The goods were concededly subject to some duty, so the appraisers were acting within their jurisdiction in finding the value of the goods. The additional duty, although labeled a penal duty, was not a seperate penalty imposed after separate factfinding, but only an increased duty imposed because the appraisers' valuation was more than 110 percent of the importer's valuation.

Fifty-six years later the Supreme Court transferred the authority of *Bartlett* from the revenue laws to immigration penalties and upheld a procedure that began to undercut the protection of the seventh amendment. *Oceanic Navigation Steam Co. v. Stranahan*[85] was an action against the collector of customs to recover a penalty paid for transporting to the United States immigrants who were afflicted with certain diseases.[86] The fact of a violation had been administratively determined by the Secretary of Commerce and Labor; the penalty had been paid voluntarily, but under protest, because the collector could not grant a clearance to the steamship until the penalty was paid. Although other sections of the statute[87]

---

[84] Tariff Act of Aug. 30, 1842, ch. 270, §§ 16 & 17, 9 Stat. 548.

[85] 214 U.S. 320 (1909).

[86] The action was brought under the Alien Immigration Act of Mar. 3, 1903, ch. 1012, 32 Stat. 1213.

[87] The Act included a variety of penalties and procedures. *E.g.*, *id.* at § 5, 32 Stat. at 1214 (civil suit, including private suit akin to breach of contract); *id.* at § 18, 32 Stat. at 1217-18 (misdemeanor); *id.* at § 19, 32 Stat. at 1218 (misdemeanor and clearance denied until fine paid); *id.* at § 38, 32 Stat. at 1221 (fine and imprisonment); *id.* at § 39, 32 Stat. at 1221 (fine and imprisonment).

created fines and criminal penalties that could be enforced only in the courts, the sanction for nonpayment of the particular penalty for transporting diseased immigrants was the administrative denial of clearance.[88]

The opinion of the Court, by the first Justice White, presents a clear example of misuse of precedent. On the basis of prior tariff, internal revenue, and taxation cases, Justice White presented the statement that his successor emphasized in *Atlas:* "[N]ot only as to tariff but as to internal revenue, taxation and *other subjects* [Congress could] impose appropriate obligations and sanction their enforcement by reasonable money penalties, *giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power.*"[89] The first Justice White did not present any case that upheld the power with respect to "other subjects," and the second Justice White likewise presents no case to support the broad assertion made in *Oceanic.* Neither Justice could do so because there is no such case. The statement is incorrect or, at best, unsupported dictum, and hardly worthy of emphasis in *Atlas* to support that opinion. By using the added claim that the power had been upheld as to "other subjects," the Court in *Oceanic* began to transform the limited exception for administrative collection of revenue into an unlimited exception that could destroy the protection of the seventh amendment. The Court did not discuss why other cases might be analogous to revenue cases; the history of the seventh amendment shows that other subjects cannot so easily be added to the revenue collection precedents.

In addition to accepting uncritically the dictum of *Oceanic,* the *Atlas* opinion presented the *Oceanic* opinion as supportive of an issue the Court had not decided in *Oceanic.* In *Oceanic* the penalty was to be collected by the administrative procedure; however, although the agency could withhold a permit the steamship needed to operate, it could not affirmatively collect the penalty. Under OSHA the agency can affirmatively collect the penalty by invoking the judicial power in a very limited manner. The *Oceanic* opinion concluded with the admonition that the Court had considered only the particular procedure of collection by an administrative denial of permission to act—in this case for a ship to proceed into port—until the penalty was paid.[90] Therefore, even if it is accepted that

---

[88] *Id.* at § 9, 32 Stat. at 1215-16.

[89] 430 U.S. at 457 (quoting Oceanic Navigation Steam Co. v. Stranahan, 214 U.S. 320, 339 (1919)) (emphasis added in *Atlas*).

[90] "We have not considered the questions which would arise for decision if the case presented an attempt to endow administrative officers with the power to

the procedure upheld in *Oceanic* is not objectionable under the seventh amendment. *Oceanic* does not support *Atlas* because the OSHA procedure is substantially different.[91] Nevertheless, *Oceanic* is the foundation for the *Atlas* conclusion that the seventh amendment allows administrative adjudication of civil penalties.

B. *The Exchequer Extent and the Public Rights Exception*

The earliest precedent used by Justice White to support the existence of a public rights exception to the seventh amendment was an excerpt from the 1856 opinion in *Murray's Lessee v. Hoboken Land & Improvement Co.*:

> [T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.[92]

The decision in *Murray's Lessee* is unassailable on seventh amendment grounds, but it does not support the *Atlas* rule because it concerned a fact situation completely unlike that presented in *Atlas*. *Murray's Lessee* involved a very specific procedure for handling disputes between the Treasury and a federal tax collector; in *Atlas*, as often before,[93] the opinion is cited to support the constitutionality of markedly different procedures. Again the historical research is important because the history demonstrates that *Murray's Lessee* supports only a specific exception limited to its facts; therefore, it is inaccurate to assume that it is an example of any broader public rights exception.

---

enforce a lawful exaction by methods which were not within the competency of administrative duties, because they required the exercise of judicial authority." 214 U.S. at 343.

[91] *Oceanic* can also be distinguished because it involves only admiralty jurisdiction for which the seventh amendment does not require a jury. Currie, *OSHA*, 1977 A.B.F. Res. J. 1107, 1156 & n.245; Note, *supra* note 5, at 477 & n.116.

The other penalty case cited in *Atlas*, Lloyd Sabaudo Societa v. Elting, 287 U.S. 329 (1932), adds no more authority to the argument. That opinion did not present a new analysis but simply repeated the prior holding of *Oceanic*. Again, as in the prior case, the seventh amendment was not mentioned; only the due process issue was considered.

Another two of the six core cases contain only dicta that add nothing new. *See* Helvering v. Mitchell, 303 U.S. 391, 402 (1938); *Ex Parte* Bakelite Corp., 279 U.S. 438, 451, 458 (1929).

[92] 59 U.S. (18 How.) 272, 284 (1856), *quoted in* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 451 n.8 (1977).

[93] *E.g.*, Phillips v. Commissioner, 283 U.S. 589, 596 (1931); Oceanic Navigation Steam Co. v. Stranahan, 214 U.S. 320, 339 (1909).

The procedure considered in *Murray's Lessee* was not an American invention; it was a development from the English practice prior to 1791.[94] The history of the land tax in England contains many instances of local collectors who did not promptly account for the taxes they collected.[95] The central treasury did not bring common law actions to recover from defaulting collectors. The procedure used was the extent, a prerogative process issued from the court of Exchequer which did not entitle the defendant to the normal trial by jury found in King's Bench or Common Pleas.[96] The extent was not widely used in England even against defaulting tax collectors[97] and was not used against taxpayers at all.[98]

Like the central authorities in England, the colonies had the problem of collecting the revenue from the local collectors.[99] The English Exchequer did not exist in the colonies, but early statutes authorized a process similar to the extent, by which the treasurer of a colony could issue a warrant to the local sheriff to collect taxes due from a defaulting collector.[100] The authorized means of enforcement was generally distraint and sale of the property of the collector by the sheriff acting without any judicial involvement.[101] Several early federal statutes also authorized such a process, which again was nonjudicial and did not involve the courts at all.[102] The question whether such procedures violated the seventh amendment was not raised in any of the early federal cases, but two early opinions do illustrate the limited reach of the procedure.

---

[94] Much of the history of treasury-collector procedure is recounted in the Supreme Court's opinion in Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856).

[95] *See generally* W. WARD, THE ENGLISH LAND TAX IN THE EIGHTEENTH CENTURY 30-59, 86-99 (1953).

[96] J. CHITTY, PREROGATIVES OF THE CROWN AND THE RELATIVE DUTIES AND RIGHTS OF THE SUBJECT 265-71 (London 1820). *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 277-78 (1856).

[97] *See* W. WARD, *supra* note 95, at 37, 50, 100-22.

[98] The entire collection process was decentralized, so the taxpayer was not a debtor to the Crown. A debtor of a debtor to the Crown could be proceeded against by the Crown by an extent in the second degree or by the Crown debtor by an extent in aid, but there is no evidence that taxes were collected from taxpayers by this procedure. The power of distress and sale was sufficient. *But see* Phillips v. Commissioner, 283 U.S. 589, 595-96 n.5 (1931) and note 156 *infra*.

[99] *See* Boyd, *The Sheriff in Colonial North Carolina*, in ESSAYS IN AMERICAN COLONIAL HISTORY 400, 409-18 (P. Goodman ed. 1970).

[100] *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 278-79 (1856).

[101] *See id.*

[102] *See* statutes cited at *id.* 279.

Ex parte Randolph [103] is valuable because one opinion is by Chief Justice Marshall sitting on circuit. Randolph had become acting purser of the frigate *Constitution* upon the death of the regular purser. After the ship returned to the United States, Randolph settled his accounts with the Treasury and received a discharge of all liability. Five years later the Treasury reopened the account and found a balance of over $25,000 due from Randolph. The Treasury then issued a warrant to the United States Marshal commanding him to collect the amount due by distress and sale of Randolph's property; if the Marshal could not find sufficient property he was to imprison Randolph until the debt was paid. The case came to the circuit court on Randolph's petition for a writ of habeas corpus. Chief Justice Marshall noted the objections that such a process violated article III and the seventh amendment,[104] but his opinion did not reach the constitutional question because the statute did not authorize the Treasury to use summary process against a person such as Randolph. The "extreme severity" of the summary process that "departs entirely from the ordinary course of judicial proceeding" [105] required that the statute be strictly construed. Regular receiving and disbursing officers might properly be subject to such process because the books of the Treasury would set out the amount of liability, but that would not authorize such a procedure in the case of a temporary purser who took over the accounts of another. Marshall implied that the Constitution would prevent Treasury adjudication if the statute had attempted to require it, because "such controverted questi[illegible] ought to be decided in a court of justice." [106]

The same statutory process was involved in another opinion of the Supreme Court, although it did not involve a seventh amendment issue. In *United States v. Nourse*,[107] decided by the Court in 1832, the Court discussed judicial involvement in the nonjudicial Treasury procedure. After Nourse had been removed from an office in the Treasury, his accounts were examined, and he was found to owe the United States over $11,000. The Treasury Department began proceedings to collect the amount due by the summary process of distress and sale by the Marshal. Nourse pursued the statutory relief available to him by seeking an injunction from the district court. The district court referred the accounts to auditors who

[103] 20 F. Cas. 242 (C.C.D. Va. 1833) (No. 11,558).
[104] *Id.* 253-54.
[105] *Id.* 255.
[106] *Id.* 257.
[107] 31 U.S. (6 Pet.) 470 (1832).

found for Nourse; as a result the district judge enjoined the Treasury from enforcing the warrant. The injunction was affirmed in the circuit court, but on appeal the Supreme Court held that the statute did not authorize the Supreme Court or the circuit court to hear an appeal by the government in such a case.[108] The decree of the circuit court was reversed, leaving the district court judgment in force in favor of Nourse.

The United States then sued Nourse in an action of assumpsit for the same amount. The Treasury Department argued that the first action had only decided that the government could not resort to the summary collection process and that it had not decided on the merits whether the $11,000 was due. The opinion by Chief Justice Marshall held that the earlier decision by the district court was *res judicata* and a bar to any further action by the United States.[109] Marshall repeated his statement in *Randolph* that the courts could not be excluded from the collection process entirely:

> It would excite some surprise, if, in a government of laws and principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process, and levy on the person, lands and chattels of the debtor, any sum he might believe to be due, leaving to that debtor no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States. While it was perceived, that the public interest required a prompt remedy against public defaulters, the legislature was not unmindful of the rights of individuals . . . .[110]

In *Nourse* the appeal from the Treasury to the courts was in the request for an injunction, and the determination of facts required the settlement of accounts by auditors. Both the complicated nature of the dispute and the remedy sought required equity proceedings, and hence the common law jury requirement of the seventh amendment was not at issue. The two opinions of Chief Justice Marshall in *Randolph* and *Nourse* indicate the limited reach of the transplanted extent under the United States Constitution. Nonjudicial or administrative procedure was not available except

---

[108] *Id.* 497.

[109] United States v. Nourse, 34 U.S. (9 Pet.) 8, 32 (1835).

[110] *Id.* 28-29.

against the very small class of regular officials handling government money, and even for those officials the Constitution might guarantee some access to the judicial system.

The most important Supreme Court precedent is the 1856 opinion in *Murray's Lessee v. Hoboken Land & Improvement Co.*[111] The case did not involve the typical collection from a taxpayer, but concerned only the procedure used by the Treasury to collect from the collector. In *Murray's Lessee*, both parties claimed the same land under different executions against the original owner, Samuel Swartwout.[112] The plaintiff claimed the land under a levy of execution on an ordinary judgment against Swartwout. The defendant claimed under a levy and sale by the Federal Marshal pursuant to a Treasury distress warrant issued because Swartwout's account was over one million dollars short. Swartwout was not a party in the Supreme Court and does not appear to have challenged the finding of a shortage in his account. The challenge of the Treasury process was made only by the plaintiff, who was therefore asserting the constitutional rights of the original owner. The Court upheld the constitutionality of the Treasury process in an opinion that reviewed the history of the extent, to demonstrate that Treasury officials could be distinguished from ordinary taxpayers and subjected to different procedures outside of the common law courts:

> This brief sketch of the modes of proceeding to ascertain and enforce payment of balances due from receivers of the revenue in England, is sufficient to show that the methods of ascertaining the existence and amount of such debts, and compelling their payment, have varied widely from the usual course of the common law on other subjects; and that, as respects such debts due from such officers, "the law of the land" authorized the employment of auditors, and an inquisition without notice, and a species of execution bearing a very close resemblance to what is termed a warrant of distress in the act of 1820, now in question.

---

[111] 59 U.S. (18 How.) 272 (1856).

[112] This is the third appearance of Samuel Swartwout in these cases. Swartwout was the defendant in Elliott v. Swartwout, 35 U.S. (10 Pet.) 137 (1836). *See* text accompanying notes 246 & 247 *infra*. After that opinion established the liability of the collector, Swartwout retained substantial sums of money in order to be able to repay successful plaintiffs; unfortunately Swartwout became insolvent and the Treasury was unable to collect all the duties Swartwout had retained. To prevent a repetition of the Swartwout affair, Congress passed the statute considered in Cary v. Curtis, 44 U.S. (3 How.) 236 (1845). *See* text accompanying notes 248-50 *infra*.

> It is certain that this diversity in "the law of the land" between public defaulters and ordinary debtors was understood in this country, and entered into the legislation of the colonies and provinces, and more especially of the States, after the declaration of independence and before the formation of the constitution of the United States. Not only was the process of distress in nearly or quite universal use for the collection of taxes, but what was generally termed a warrant of distress, running against the body, goods, and chattels of defaulting receivers of public money, was issued to some public officer, to whom was committed the power to ascertain the amount of the default, and by such warrant proceed to collect it.[113]

The opinion in *Murray's Lessee* does not support the proposition that the federal government may substitute administrative tribunals for the article III courts in all cases, or all "public rights" cases as suggested by Justice White in *Atlas*. If the sentence from *Murray's Lessee* quoted by Justice White in *Atlas*[114] is interpreted as establishing a public rights exception, the sentence is dictum unsupported by history; the careful historical analysis presented in *Murray's Lessee* compels the conclusion that the Court was not therein establishing a public rights exception. The entire opinion shows that the particular procedure in *Murray's Lessee* was upheld against the constitutional challenge because there was a clear, definite, and limited history that a particular procedure had existed prior to the Constitution and had not been altered by the Constitution. The public official, in accepting the office and trust, accepted the historical procedure for protecting the government revenue, but an ordinary citizen cannot be said to have relinquished the constitutional protection afforded by article III courts and the seventh amendment.

C. *The Misleading Authority of Modern Dictum*

In addition to the six tax, tax penalty and customs and immigration penalty cases represented by *Oceanic* and *Murray's Lessee*, Justice White summoned five other cases[115] to support the argument that the Court had recognized a public rights exception to the

---

[113] 59 U.S. (18 How.) at 278-79.

[114] See note 92 *supra* & accompanying text.

[115] Parnell v. Southall Realty, 416 U.S. 363 (1974); Curtis v. Loether, 415 U.S. 189 (1974); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Crowell v. Benson, 285 U.S. 22 (1932); Block v. Hirsh, 256 U.S. [illegible].

seventh amendment prior to *Atlas*. The two most recent cases, *Curtis v. Loether* and *Pernell v. Southall Realty* clearly provide only dicta in support. The apparent support provided by the other three cases disappears upon a closer reading, because in none of the cases did the Court specifically uphold any procedure similar to OSHA against a seventh amendment challenge; if the cases established a public rights exception they did so only in dicta unsupported by precedent or analysis.

Justice White uses the opinion in *Block v. Hirsh* [116] in a manner that overstates the true holding by Justice Holmes. The authority derived from *Block* is summarized in a paragraph quoted by Justice White in *Atlas* to emphasize that the Court "squarely rejected" the seventh amendment challenge:

> The statute is objected to on the further ground that landlords and tenants are deprived by it of a trial by jury on the right to possession of the land. *If the power of the Commission established by the statute to regulate the relation is established*, as we think it is, by what we have said, *this objection amounts to little. To regulate the relation and to decide the facts affecting it are hardly separable.*[117]

The quotation alone does not explain the reasons for the conclusion that the seventh amendment does not apply. Justice White attempted to place the quotation in context by explaining that the challenged statute "temporarily suspend[ed] landlords' legal remedy of ejectment and relegat[ed] them to an administrative factfinding forum charged with determining fair rents at which tenants could hold over despite the expiration of their leases." [118] That description of the statute, while more accurate than the description written by Justice Marshall in *Pernell*,[119] still does not adequately explain the *Block* opinion. The actual holding of *Block* with respect to the seventh amendment issue was much more limited than the Court implied in *Atlas*.

The statute [120] challenged in *Block* created a rent control plan for the District of Columbia to deal with the disruption of the hous-

---

[116] 256 U.S. 135 (1921).

[117] 430 U.S. at 452 (quoting Block v. Hirsh, 256 U.S. 135, 158 (1921)) (emphasis added in *Atlas*).

[118] 430 U.S. at 451-52.

[119] "[The] statute transferr[ed] actions to recover possession of real property from the courts to a rent control commission." 416 U.S. at 382.

[120] The Food Control and the District of Columbia Rents Act of Oct. 22, 1919, ch. 80, title II, 41 Stat. 297.

ing market in the District after World War I. As part of the rent control plan, the statute permitted tenants to hold over, after the expiration of a lease, at the rent set in the expired lease. The landlord could increase the rent only upon a determination by the administrative agency that a higher rent would be fair and reasonable.[121] In addition, a narrow exception to the hold over right was created in the statute if the owner wanted to occupy the premises or planned to tear down the building and rebuild; again the administrative agency determined whether the landlord could obtain possession under that exception.[122] The Court in *Block* divided five to four. Both the majority opinion by Justice Holmes upholding the regulation and the dissent by Justice McKenna focused on the scope of the police power and the asserted public interest in rents in the District. Justice Holmes upheld the rent control as a temporary measure made necessary by an emergency situation. The procedure was upheld because the Court found it reasonable, in light of the emergency, to suspend the ordinary remedies.[123]

In addition, the rent control statute did not completely suspend the remedy of ejectment, as stated in *Atlas*,[124] or transfer actions to recover possession from the courts to a rent control commission, as stated in *Pennell*.[125] The administrative procedure was required for only two issues: rent increases, and owner occupancy or reconstruction. All other issues remained unaffected by the statute, and could be determined in the usual manner.[126] A tenant who failed to pay rent had to be evicted in the usual manner, and rent overpayments and underpayments could only be recovered in ordinary legal actions in the courts.[127] The agency could determine the accuracy, sufficiency, and good faith of the landlord's notice to vacate to recover possession for the landlord's own use, but it could not evict a tenant who ignored a proper notice; the ejectment procedure was still judicial and between private parties. Even the administrative agency had to employ the courts to collect statutory

[121] *Id.* at §§ 106-08, 41 Stat. at 300-02.

[122] *Id.* at § 109, 41 Stat. at 301-02.

[123] The Act was emergency legislation that expired at the end of two years. *Id.* at § 122, 41 Stat. at 304. "The regulation is put and justified only as a temporary measure. . . . A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." 256 U.S. at 157.

[124] 430 U.S. at 451-52.

[125] 416 U.S. at 382.

[126] The tenant was protected from eviction only as long as the rent was paid and the conditions of the lease were fulfilled. The Food Control and the District of Columbia Rents Act of Oct. 22, 1919, ch. 80, title II, § 109, 41 Stat. at 301-02. The Act did not authorize the commission to hear eviction actions.

[127] *Id.* at §§ 107 & 110, 41 Stat. at 300-01, 302.

penalties from landlords who violated the Act.[128] Justice Holmes, writing for the Court in *Block*, did not hold that there was no seventh amendment objection to entrusting landlord-tenant disputes to an administrative agency. The opinion establishes only that Congress may constitutionally empower an agency to determine certain facts when an emergency requires the government to regulate rates.[129] The facts found by the agency could not be relitigated in a subsequent court action,[130] but a judicial proceeding was required to force a recalcitrant party to act in accordance with any agency finding;[131] such a proceeding would be subject to the seventh amendment.

Any appearance that the quotation from *Block* supports the *Atlas* rule disappears when the circumstances of each case are compared. The temporary emergency that was the foundation of *Block* is absent in *Atlas*. The limited role of the rent commission in *Block* is not duplicated by the OSHRC in *Atlas*. Finally, *Block* hardly supports the announced rule of *Atlas* that administrative adjudication is possible when the government sues in its sovereign capacity to enforce public rights.[132] The government was not a party in *Block;* the lawsuit was only between a landlord and tenant.

In a similar fashion, any indication that support for *Atlas* can be found in the quotation from *Crowell v. Benson*[133] disappears upon a closer reading of the case. In a footnote to the *Atlas* opinion,[134] Justice White conceded that *Crowell* was not directly on point, because it involved private rather than public rights. *Crowell* was also an admiralty case, and the seventh amendment does not require a jury in admiralty cases.[135] Nevertheless, *Atlas* set out a

---

[128] *Id.* at § 112, 41 Stat. at 302.

[129] Justice Holmes considered the statute as a form of regulation of rates of a business "clothed . . . with a public interest," 256 U.S. at 155, and therefore valid under the well established precedent of Munn v. Illinois, 94 U.S. 113 (1876). 256 U.S. at 157.

[130] The Food Control and the District of Columbia Rents Act of Oct. 22, 1919, ch. 80, title II, § 106, 41 Stat. at 300.

[131] An appeal to the court of appeals from the commission's determination was authorized, *id.* at § 108, 41 Stat. at 301, in which the commission's findings were to be reviewed on the administrative record only and not modified or set aside except for "error of law." If an owner collected any rent in excess of the amount fixed by the commission, the commission could recover an amount twice that excess. The tenant would be returned the excess paid and the balance was to be paid into the treasury. The doubled amount was similar to a civil penalty; it was recovered by an action in the municipal court. *Id.* at § 112, 41 Stat. at 302.

[132] 430 U.S. at 450.

[133] 285 U.S. 22 (1932).

[134] 430 U.S. at 450.

[135] *Id.* n.7.

paragraph of dictum from *Crowell* that summarized the cases upholding factfinding by administrative agencies, again with emphasis added to the language that seemed to imply a public rights exception to the seventh amendment.[186] The Court in *Crowell*, however, was not interpreting the seventh amendment, because *Crowell* was an admiralty case. Of the fifteen cases listed in *Crowell*,[187] only three can be said to have involved the seventh amendment issue present in *Atlas*, and again the three cases were the tax collection precedents.[188] The dictum in *Crowell* that Justice White refused to disregard [189] in *Atlas* must be disregarded because it is completely unrelated to the facts of *Atlas*. In *Atlas* the government was attempting to extract money from the citizens as a civil penalty without a jury trial. The prior cases set out in *Crowell* do not support such a right; they merely establish two propositions unrelated to each other: (1) the government can collect taxes without a jury trial in the first instance, and (2) the government can employ administrative agencies to determine eligibility for some congressionally created "public rights," such as war risk insurance.[140] The latter, however, are not the rights involved in *Atlas*. The two propositions simply cannot be combined to support the *Atlas* rule. The tax cases cited in *Crowell* are strictly limited by the seventh amendment history to collection of taxes; claims against the government are not the same as claims by the government, and the remaining cases contain no discussion of any seventh amendment issue.

NLRB v. Jones & Laughlin Steel Corp.[141] is another case presented in support of *Atlas*.[142] Once again the actual holding is over-

---

[186] 430 U.S. at 452.

[187] *See* 285 U.S. at 50-51.

[188] The three are Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856); Phillips v. Commissioner, 283 U.S. 589 (1931); and Passavant v. United States, 148 U.S. 214 (1893).

[189] "[Petitioners] would have us disregard the dictum in *Crowell v. Benson* . . . ." 430 U.S. at 456.

[140] The quotation from *Crowell* set out in *Atlas* includes several illustrations of administrative agencies with power to determine various matters such as "interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans." 430 U.S. at 452 (quoting Crowell v. Benson, 285 U.S. 22, 51 (1932)). The non-tax examples are a mixed collection of rate making cases, claims against the government, and administrative cases in which there is no discussion of any seventh amendment issue. There is no discussion in *Crowell* or *Atlas* of how collection of a penalty by the government can be equated with, for example, a claim against the government under the War Risk Insurance Act, Silberschein v. United States, 266 U.S. 221 (1924), or a claim against the government by a military officer for lost personal property, United States v. Babcock, 250 U.S. 328 (1919).

[141] 301 U.S. 1 (1937).

[142] 430 U.S. at 453-54.

stated. The primary reasoning used by the Court in *Jones & Laughlin* to uphold the NLRB's order for reinstatement and back pay against the employer's seventh amendment challenge was that the remedy of reinstatement, even accompanied by an order for back pay, was the type of relief historically available only from an equity court. Therefore, the relief would not have been available at common law, and the seventh amendment, by its terms, does not require a common law jury in cases traditionally tried in equity. The damage award was deemed incidental to the equitable relief.[143] Justice White interpreted the *Jones & Laughlin* opinion to include a second ground for rejecting the seventh amendment argument: the action was also a suit at common law because it is "one unknown to the common law. It is a statutory proceeding."[144] Although the *Jones & Laughlin* opinion itself does not so state, Justice White concluded that the language was a clear holding that administrative proceedings, as well as equity and admiralty suits, are not subject to any seventh amendment challenge. That conclusion oversimplifies the actual holding of *Jones & Laughlin* as well as the precedents supporting the decision.

Even though the second ground identified by Justice White was not stated to be a separate and independent reason for rejecting the seventh amendment challenge, Justice White argued that it had to be so considered because the first ground alone would be "insufficient to decide the more general question of the NLRB's power to order backpay where . . . no such equitable order was sought."[145] The argument is weak because the Court did not decide that "more general question" in *Jones & Laughlin* and has never expressly addressed the question in the ensuing forty years.[146] It is hardly sound constitutional analysis to base an assault on the seventh amendment on an interpretation of an implication in an earlier opinion in which the issue was not discussed and in which not a single relevant precedent is cited. The only precedent cited as authority for the decision in *Jones & Laughlin* upheld factfinding by a court without a jury in a case that involved a claim against a city in the Oklahoma

---

[143] 301 U.S. at 48-49.

[144] 430 U.S. at 453 (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937)).

[145] 430 U.S. at 453 n.10.

[146] The seventh amendment issue was not discussed in the only Supreme Court case listed in the *Atlas* footnote as "See Radio Officers v. NLRB, 347 U.S. 17, 54 (1954)." *Id. Jones & Laughlin* was ignored on seventh amendment issues until 1974. The lower federal courts did not follow any consistent interpretation of *Jones & Laughlin*. *See* Currie, *supra* note 91, at 1156 & n.248; Note, *supra* note 5, at 470-71 & n.77.

Territory.[147] Other cases not cited in *Jones & Laughlin* had allowed administrative or executive factfinding without a jury in cases such as pension claims against the government,[148] the right to government land under land grants,[149] and rate setting for public utilities.[150] No case had upheld such administrative factfinding in a case in which the government sought to exact money in a procedure analogous to that in OSHA.

If the language of *Jones & Laughlin* is interpreted as Justice White suggests in *Atlas* (following the lead of Justice Marshall in *Curtis v. Loether* and *Pernell v. Southall Realty* decided three years earlier) the statement is purely dictum unsupported by authority.[151] *Jones & Laughlin* supports the *Atlas* rule only if it is assumed that if the administrative procedure of one agency in a particular case does not violate the seventh amendment, then any agency and every administrative procedure will be equally constitutional. That assumption can be made only if history is ignored. The correct interpretation of the seventh amendment should not depend so strongly on the implications of a cryptic paragraph[152] when scores of past opinions are available to explain the scope of the seventh amendment. The assumption takes the existence of a public rights exception as a given fact, and eliminates any need to demonstrate that such a broad exception was known to the common law of 1791.

III. Restoring a Right to Jury Trial—The Tax Precedents

The preceding section of this Article has argued that there was no public rights exception to the seventh amendment known to the common law of 1791 and that no public rights exception had been established in the cases preceding *Atlas*. If *Atlas* created a public rights exception, it did so only by expanding the exception for administrative collection of taxes to include the collection of civil penalties. If it is recognized that *Atlas* rests on the tax collection

147 Guthrie Nat'l Bank v. Guthrie, 173 U.S. 528 (1899).

148 *E.g.*, Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840).

149 *E.g.*, Burfenning v. Chicago, St. P., M. & O. Ry., 163 U.S. 321, 323 (1896), McCormick v. Hayes, 159 U.S. 332, 341-47 (1895).

150 *E.g.*, Tagg Bros. & Moorhead v. United States, 280 U.S. 420 (1930); Virginian Ry. v. United States, 272 U.S. 658 (1926).

151 Justice White in *Atlas* did not attempt to support his reading of *Jones & Laughlin* with any other precedent.

152 The seventh amendment issue was discussed in two paragraphs at the end of a 28 page opinion; clearly the jury trial issue was not the major concern of the Court. *See also* Frank Irey, Jr., Inc. v. Occupational Safety & Health Review Comm'n, 519 F.2d 1215, 1221-25 (3d Cir. 1975) (Gibbons, Aldisert, & Hunter, JJ., dissenting); *id.* at 1226 (Garth, J., dissenting), *aff'd sub nom.* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442 (1977).

precedents, then the opinion did not completely exclude the possibility of a civil jury trial in OSHA actions. A modern taxpayer has a statutory right to jury trial, not at the assessment or collection stage, but only in an action to recover the tax after it has been collected by the government.[153]

The opinion in *Atlas* does not discuss the possibility of a jury trial in a refund action. The parties did not discuss the possibility because the petitioners' challenge came after the proceedings before the OSHRC but before the penalty had been paid. One implication from the policy arguments presented in *Atlas* is that the Court intended to determine whether a right to jury trial exists at any stage of these proceedings, either before or after collection. In its discussion of the prior cases, the Court appears to use "initial" administrative adjudication interchangeably with adjudication "exclusively" by an administrative agency.[154] One implication from this is that the Court interpreted the tax collection precedents as establishing that there was never a constitutional right to a jury trial, either before or after collection. Although a first reading of the opinion suggests that the Court held there is never a right to a jury trial in OSHA penalty cases, the Court actually held only that there is no right to a jury trial before collection of the penalty.

Contrary to the implication of *Atlas*, the civil jury is not unknown in federal tax cases, and the seventh amendment guarantees a right to jury trial in these cases. Why there is a right to a jury trial has not always been clearly recognized; in recent years there has been almost no attention to the extent of any constitutional right. The analysis that establishes this right has not been examined for decades but must be explored today. Otherwise, *Atlas* will be the first step in misusing the narrow precedents from tax cases to destroy much of the protection of the seventh amendment.

This section will focus primarily on the history prior to 1856, the period not discussed in the *Atlas* opinion. That omission is unfortunate, because the early cases develop perspective and explain important distinctions in the later opinions. The analysis first examines the development of English tax procedures and the role of the common law jury; the common law can fully be understood only if its history is known. The available records of the colonial practices will then be examined to determine the influence of the English experience on colonial law. With this background from the English and colonial experience, the next section will discuss the

153 28 U.S.C. § 2402 (1970).

154 430 U.S. at 450.

early cases between 1791 and 1855. This period is most often completely ignored [155] because there are no United States Supreme Court opinions on point, but there is a wealth of lower federal and state court opinions that illuminates the seventh amendment history. Finally, the Supreme Court precedents will be examined to determine the extent to which the seventh amendment guarantees a jury trial in tax cases.

A. *The English History, 1601-1791*

To a modern reader, the history of tax collection in England appears complicated and incompletely recorded. Examination of the history is made especially difficult by a lack of historical analysis in the opinions of American courts that refer to bits of English history without an explanation of why the particular precedents chosen are relevant.[156] The most serious mistake is the assumption that all English tax collection procedures are equally relevant to the background of the seventh amendment. All English taxes were not the same, nor were they collected in the same manner. English tax cases can be understood and reconciled only by following the distinctions made in the common law. Therefore, the starting point must be an outline of early English tax history to determine which precedents are relevant to American decisions that interpret the seventh amendment.

For present purposes the focus on English taxation concerns the collection of three different kinds of revenue: the King's ordinary revenue, the King's extraordinary revenue, and the local taxes like the poor rate. The King's ordinary revenue came from eighteen different sources, including the rents of the demesne lands, shipwrecks, treasure-trove, forfeitures for offenses, escheats, and custody of idiots.[157] The King's extraordinary revenue included the land tax, malt tax, customs on merchandise imported and exported, internal excise duty, salt duty, post office duty, stamp duty, house and window duty, and servant duty.[158] Local taxes such as the poor rate

---

[155] *See, e.g.*, Plumb, *Tax Refund Suits Against Collectors of Internal Revenue*, 60 HARV. L. REV. 685, 688-89 (1947). *See also* Flora v. United States, 362 U.S. 145, 185-86 & n.5 (1960) (Whittaker, J., dissenting).

[156] One example is the opinion of Justice Brandeis in Phillips v. Commissioner, 283 U.S. 589, 595-96 n.5 (1931), in which he incorrectly implies that administrative tax collection by the United States is derived from the English immediate extent in the second degree. The note documents the existence of each practice but fails to document the asserted relationship. There does not appear to be any evidence that the one was derived from the other.

[157] 1 W. BLACKSTONE, COMMENTARIES *281-306.

[158] *Id.* *306-26.

were not part of the royal revenue; they were raised and spent locally under the authority of Parliamentary statutes.[159] Distinctions among the three types of taxation are important, because collection procedures were not the same and the place of the jury differed in litigation involving each type of tax.

It is also important to recognize the differences among the various English courts.[160] The four national courts of importance in England were Common Pleas, King's Bench, Exchequer, and Chancery. The Court of Common Pleas had jurisdiction chiefly over cases between subject and subject.[161] The core jurisdiction of King's Bench consisted of cases touching the King's interest, and encompassed criminal and civil cases and supervision over various state officials.[162] Exchequer had jurisdiction over revenue matters; Exchequer also exercised some equitable and common law jurisdiction.[163] Chancery was the principal court of equity.[164] The jurisdiction of King's Bench, Common Pleas, and Exchequer overlapped in many areas, however, because each court increased its jurisdiction by the use of pleading fictions. Exchequer did retain as a core of jurisdiction all cases touching the royal revenue, although not all tax litigation was in this court.

Exchequer employed several forms of procedure to collect the King's ordinary revenue; the most relevant to this discussion are the extent and the information. The information was the procedure used to collect forfeitures and to condemn seizures for violations of the trade laws; the procedure included the right to a jury trial.[165] The extent was used to collect debts, contract debts, and some of the ordinary revenue; the procedure seems to have involved a jury, although perhaps not the usual common law jury.[166] Neither procedure provided the foundation for the later development of ordinary tax collection methods in the United States.[167]

---

[159] *Id.* *359-65.

[160] *See generally* 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 73-170, 194-264 (1903).

[161] *Id.* 76.

[162] *Id.* 83.

[163] *Id.* 104.

[164] *Id.* 237-38.

[165] *See* 3 W. BLACKSTONE, *supra* note 157, at *261-62. *See also* People v. One 1941 Chevrolet Coupe, 37 Cal. 2d 283, 231 P.2d 832 (1951).

[166] *See* J. CHITTY, *supra* note 96, at 265-71.

[167] The manner in which the practice of the information affects seventh amendment interpretation was discussed in the preceding section on the early penalty cases, *see* text accompanying notes 75-81 *supra*. The manner in which the practice of the extent affects seventh amendment analysis was discussed in the preceding section on *Murray's Lessee v. Hoboken Land & Improvement Co.*, *see* text accompanying notes 92-114 *supra*.

These Exchequer processes were developed over the centuries to collect the King's ordinary revenue. The extent and the information did not provide a model for tax collection in the colonies, however, because these taxes had declined in importance by 1600.[168] The forfeitures, collected through the information process, were common throughout England, but it is unlikely that many of the settlers were familiar with the extent procedure used to collect most of the other ordinary revenue. The extraordinary revenue and the poor rate were taxes to which most of the colonists were subject in England, so the tax collection procedures for the extraordinary revenue and the poor rate were more familiar to the colonists. These were the procedures transplanted to the New World, later to become part of the background of the seventh amendment.

The poor rate has the longer history of the two taxes. A Parliamentary statute in 1601 created the poor rate throughout England.[169] In each community the overseers of the poor were to raise money for the relief of the poor by collecting a poor rate similar in form to a real property tax. In addition to the overseers, the local justices of the peace were involved as supervisors of the overseers, as assessors, and as a board of review at quarter sessions.[170] If anyone did not voluntarily pay the rate assessed, the overseers could collect the amount under a warrant from any two justices of the peace authorizing distress and sale of the goods of the nonpayer.[171] The procedure was summary and not in the form of a lawsuit; the justices acted in an administrative rather than a judicial capacity. There were, of course, no trial at common law and no jury involved in the issuance of the warrant for nonpayment or in the distress and sale.[172] The procedure allowed assessment and collection of taxes with the relevant facts initially determined by an "administrative agency." The remedy for those aggrieved by this summary process was review by the justices of the peace at their quarter sessions.[173] The collection process was entirely local and did not involve the Exchequer or its processes at all.[174]

---

[168] See 1 W. BLACKSTONE, supra note 157, at *306.

[169] An Act for the Relief of the Poor, 43 Eliz. c. 2 (1601). See 10 W. HOLDSWORTH, supra note 160, at 269-99 (1938). See generally id. 173-77, 211-14, 257-69.

[170] 10 W. HOLDSWORTH, supra note 160, at 286-89.

[171] An Act for the Relief of the Poor, 43 Eliz., c. 2, § 4 (1601).

[172] See id.

[173] See id. § 6.

[174] See authority cited note 169 supra.

The primary part of the extraordinary revenue, the land tax, has a more recent history.[175] This tax was adopted following the Glorious Revolution of 1688, when Parliament settled a revenue on the new rulers, William and Mary, and provided for a land tax to replace several other exactions of earlier royalty.[176] The method of collection for the land tax was similar to, although more involved than, that for the poor rate.[177] The country was divided into collection districts, each district was assigned a quota of the total tax, and collection of the portion of the annual tax required of the area was made by local assessors and collectors. The local subcollectors paid the money to head collectors who in turn paid the money to receivers general. The receivers general then sent the tax for their area to the Exchequer in London.[178]

Nonpaying citizens were not subject to Exchequer process; instead the local collectors had the power to levy and sell goods or chattels for nonpayment. Again the distress and sale was not authorized by any judicial order or law suit, but by a precept from the local commissioners.[179] A claim of an inaccurate assessment did not involve the judges because review of assessments was also done by the local commissioners[180] as an administrative function; it was not a common law suit and had no jury trial. Exchequer process was available against a receiver who did not account to the Exchequer for the money collected,[181] but even seriously defaulting receivers were rarely proceeded against by Exchequer extent.[182] There is no evidence that ordinary taxpayers were ever subject to the extent; they either paid the local collector voluntarily, or the local collector levied and sold their property.[183]

Both the poor rate and the land tax were collected without using common law actions in the courts, but the common law jury had a place in both collection processes. There was no right to a

---

[175] *See generally* 1 W. BLACKSTONE, *supra* note 157, at *308-13; W. WARD, *supra* note 95, at 1-3.

[176] An act for granting to their Majesties an Aid of four Shillings in the Pound for one year for carrying on a vigorous War against France, 4 W. & M., c. 1 (1692).

[177] *Compare id.* with 43 Eliz., c. 2 (1601).

[178] 4 W. & M., c. 1, § 10 (1692).

[179] *Id.* § 12.

[180] *Id.* § 20. *See* 3 R. BURN, THE JUSTICE OF THE PEACE AND PARISH OFFICER 47 (11th ed. 1769).

[181] J. CHITTY, *supra* note 96, at 266.

[182] *See* W. WARD, *supra* note 95, at 100-13.

[183] *See* notes 97 & 98 *supra* & accompanying text. *See generally* G. GILBERT, AN HISTORICAL VIEW OF THE COURT OF EXCHEQUER AND OF THE KING'S REVENUES THERE ANSWERED (London 1738); G. GILBERT, TREATISE ON THE COURT OF EXCHEQUER (London 1758); W. WARD, *supra* note 95.

jury trial before the tax was collected because the collection did not involve the judicial function; the possibility of a jury arose after collection in common law actions challenging liability for the tax.[184] The role of the jury increased with the growth of the power of the common law courts. The contest between crown and Parliament in the 17th century over the power to tax was eventually won by Parliament. That contest was the most dramatic of the period, but during the same period that Parliament was increasing its power the common law courts were also expanding their jurisdiction. The procedure in the common law courts involved the jury trial; therefore, the increasing power of the common law courts meant an increase in the use of the jury.

An early and central figure in the development of the role of the jury was Sir Edward Coke. His efforts to elevate the common law courts were unsuccessful when he attacked Chancery; in the best-known showdown, James I clearly placed Chancery above the common law courts.[185] Other efforts are less well known, even though they were more successful, especially the effort to control the many specialized courts. The landmark opinion was that of Lord Coke sitting in King's Bench in the *Case of the Marshalsea*.[186] By 1600 the ancient Court of the Marshalsea existed only as a special court with its jurisdiction limited to disputes involving members of the royal household or anyone living within twelve miles of the King's residence.[187] In practice, however, the court did not restrict its jurisdiction to those limits, and in the *Case of the Marshalsea*, King's Bench successfully declared that it had the power to control such a limited court. The control was indirect; if such a court exceeded its powers, the party injured by the usurpation could sue the judges in a common law action in King's Bench.[188] The determination whether the limited jurisdiction had been exceeded was made by King's Bench, not by the specialized court. This enhancement of the power of King's Bench seems to have been unchallenged

---

[184] For example, an action against the collector in trespass, trover, or in assumpsit for money had and received. *See* notes 194-99 *infra* & accompanying text.

[185] *See* Arguments Proving from Antiquity the Dignity, Power, and Jurisdiction of the Court of Chancery, 21 Eng. Rep. 576 (1616). *See generally* 10 W. HOLDSWORTH, *supra* note 160, at 648-50.

[186] 77 Eng. Rep. 1027 (K.B. 1612).

[187] *See* 3 W. BLACKSTONE, *supra* note 151, at *75-76.

[188] For example, in the *Case of the Marshalsea*, the suit was an action of trespass of assault, battery, wounding, and false imprisonment against the marshal of the Marshalsea, an officer of the staff, and a lower officer who had arrested and imprisoned the plaintiff under a precept from the Court of the Marshalsea.

and became an established precedent to be developed by later judges in King's Bench, Common Pleas, and Exchequer.[189]

A similar effort to control the local sewer commissions—restricted courts with power of levy and sale to collect assessments to support drainage facilities—resulted in a standoff between the common law courts and the Crown.[190] The privy council asserted authority to oust the common law courts from any jurisdiction to control the sewer commissions, and Lord Coke's refusal to accept that limitation was a reason for his discharge by James I as Lord Chief Justice,[191] but eventually the later judges also established the power of King's Bench to control the sewer commissions.[192]

These early assertions by the common law courts were part of a larger development, "for the common lawyers had formed the grandiose plan of making their system sole and supreme over all persons and causes." [193] Eventually solid doctrine emerged that subjected the administrative officials such as tax collectors to the power of the common law courts. The power was asserted in common law actions in which the local and Crown officials were required to defend their conduct by proving jurisdiction to take the action challenged by the injured citizen. The use of the common law actions in the common law courts necessarily involved civil jury trial as an essential part of the procedure. An official was not liable for an error in exercising jurisdiction actually granted, but the injured citizen could win if the official had exceeded his jurisdiction.

Two early cases illustrate the scope of the power of control exercised by the common law courts during this important period of development. The first, *Nichols v. Walker*,[194] involved the poor rate in a 1634 case. The action was in trespass against the church warden and the overseer of the poor of the parish of Hatfield. The defendants entered the plaintiff's house and seized his chattels, which were sold to collect the poor rate. Plaintiff claimed he was not subject to the poor rate because he was not an inhabitant of Hatfield

---

189 The development in Exchequer was in the common law part of Exchequer and not the revenue part.

190 *See* Hetley v. Boyer, 79 Eng. Rep. 287 (K.B. 1614); The Case of Chester Mill Upon the River of Dee, 77 Eng. Rep. 1134 (K.B. 1609); Keighley's Case, 77 Eng. Rep. 1136 (K.B. 1609); The Case of the Isle of Ely, 77 Eng. Rep. 1139 (K.B. 1609).

191 10 W. HOLDSWORTH, *supra* note 160, at 648.

192 *See generally* 3 W. BLACKSTONE, *supra* note 157, at *73-74; 10 W. HOLDSWORTH, *supra* note 160, at 199-206.

193 T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 197 (5th ed. 1956). *See generally* 5 W. HOLDSWORTH, *supra* note 160, at 423-93.

194 79 Eng. Rep. 944 (K.B. 1634).

and owned no land in the parish. Apparently there were no factual issues for the jury to determine, because the defendants admitted the taking. They justified their action by claiming that the village of Tottridge, where plaintiff lived, was part of the parish of Hatfield. The jury found a special verdict, leaving the court to determine whether Tottridge was still part of Hatfield, even though there was no legal record of a separation. The court held for the plaintiff and determined that he was not subject to being rated in Hatfield. The defendants' claim that they should not be liable for the trespass because their acts were authorized by a warrant from the justices of the peace was rejected; the warrant provided authority only if the justices had jurisdiction, and the factual finding in King's Bench established there was no such jurisdiction.

A later case in Exchequer in 1668 [195] was an action of trover and conversion for goods levied and sold by the commissioners of excise in London to collect an excise on wine, a part of the King's extraordinary revenue. Again it appears that the jury returned a special verdict finding the facts; the case reported is the argument and decision of the full court on the legal question. The defense of the commissioners (that they were only mistaken in the exercise of their jurisdiction) was unsuccessful. By assessing a duty on wine that was later found not dutiable in the trover action, the commissioners exceeded their authority and were therefore liable to the plaintiff.

By 1791 the doctrine had matured, and established that officials collecting the poor rate, land tax, excise duty, or similar taxes were liable to a common law action in which King's Bench, Common Pleas, or Exchequer would determine whether the officials had properly determined that the tax was owed. The hardship on the officials of being subject to suit did not cause either the King or Parliament to oust the common law courts from the jurisdiction developed over two centuries. The only relief extended to the officials was a requirement of one month's advance notice of any suit brought against them with particulars (evidence at trial to be limited to that mentioned in any such notice), a chance to tender amends, a special pleading statute that allowed a defendant to plead the general issue and to defend under that plea with evidence of the particular authority, and the right to treble costs if plaintiff discontinued or lost his action.[196] The form of the action varied; liability

[195] Terry v. Huntington, 145 Eng. Rep. 557 (K.B. 1668).

[196] *E.g.*, 24 Geo. 3, c. 70, §§ 30-34 (1783). *See also* An act for ease in pleading troublesome and contentious suits prosecuted against justices of the peace;

to a tax was challenged in actions of trespass,[197] trover,[198] and money had and received.[199] Significantly, the common law actions were not available to challenge the amount of an assessment or tax,[200] although a review of assessments was available from the justices of the peace at quarter sessions (or from the local commissioners in the case of the land tax).[201] Doctrine based on the *Case of the Marshalsea* did not make the officials liable for an erroneous assessment, because such a mistake would have been an error in exercising a granted jurisdiction and not an attempt to exercise jurisdiction beyond that granted.

These precedents developed in the English courts between 1601 and 1791 allowed a citizen to litigate most disputes over tax liability before a common law civil jury. The common law actions were not available if the liability had already been litigated in the Exchequer by condemnation of the goods.[202] The contest did not occur before the collection of the tax, because collection was accomplished without invoking the judicial power in the context of a lawsuit. Although in many cases the jury served only to return a special verdict and left the real contest to the decision of the judges, it cannot be denied that the traditional role of the jury in the tax cases was firmly established. The role and power of the jury that followed from this successful assertion of jurisdiction by the common law courts were transplanted to the colonies, where the jury eventually formed part of the background of the seventh amendment.[203]

B. *The American Experience Prior to 1791*

Published reports of American decisions prior to 1791 are rare; the few volumes available provide an extremely limited picture of

---

mayors, constables, and certain other his Majesty's officers, for the lawful execution of their office, 7 Jac., c. 5 (1609).

[197] *E.g.*, Williams v. Pritchard, 100 Eng. Rep. 862 (K.B. 1790); Harrison v. Bulcock, 126 Eng. Rep. 42 (C.P. 1788); Lord Amherst v. Lord Sommers, 100 Eng. Rep. 200 (K.B. 1788); Hutchins v. Chambers, 97 Eng. Rep. 458 (K.B. 1758). *See also* Patchett v. Bancroft, 101 Eng. Rep. 1024 (K.B. 1797).

[198] *E.g.*, Eddington v. Borman, 100 Eng. Rep. 863 (K.B. 1790).

[199] *E.g.*, Irving v. Wilson, 100 Eng. Rep. 1132 (K.B. 1791); Stevenson v. Mortimer, 98 Eng. Rep. 1372 (K.B. 1778); Campbell v. Hall, 98 Eng. Rep. 1045 (K.B. 1774); Camplin v. Bullman, 145 Eng. Rep. 755 (Ex. 1761).

[200] Patchett v. Bancroft, 101 Eng. Rep. 1024 (K.B. 1797).

[201] *See* 10 W. HOLDSWORTH, *supra* note 160, at 287-89; note 180 *supra* & accompanying text.

[202] Scott v. Shearman, 98 Eng. Rep. 575 (K.B. 1774).

[203] The English common law courts became less vigorous in asserting their jurisdiction after 1791, but by that time the doctrine had become established in the United States. *See* Earl of Radnor v. Reeve, 126 Eng. Rep. 1345 (C.P. 1801). Allen v. Sharp, 154 Eng. Rep. 529 (Ex. 1848).

the precedents on tax collection procedure and the jury trial known to the framers when the Constitution and the seventh amendment were adopted. Although frequently neglected, an examination of colonial practice is also necessary to a complete understanding of which tax precedents were part of the common law known in the colonies before 1791. The framers' understanding of the English common law that the seventh amendment was intended to preserve may not have included the entire English practice. English juries were involved in common law suits against tax collectors, but not in the extent procedure of the Exchequer, so two different lines of precedent could have been preserved. Fortunately, there is evidence from the American experience prior to 1791 to establish that jury determination of liability in taxpayer cases was part of the common law known in colonial procedure.

The best illustration of the use of a common law action to challenge tax liability is the Massachusetts case of *Erving v. Cradock*.[204] This 1761 case was reported and more widely known than most decisions because it was not an ordinary action. The suit was a test case brought as an attempt to create a new method of resisting collection of English duties in the colonies. George Cradock served as collector for the port of Boston. He had seized a ship owned by John Erving, charged it with trade in contraband, and libeled the ship in the court of admiralty where a jury trial was not available. In the admiralty court Erving agreed to a settlement providing for the return of the ship to him upon payment of one half of its appraised value to the court. The money was paid, distributed by the court as required, and the case ended in the admiralty court.

Upon termination of the admiralty procedure, Erving brought a trespass action against Cradock in the colonial court of common pleas, and alleged that the seizure had been illegal. The jury found for Erving and awarded him damages in excess of £600. On appeal to the superior court, another jury again found for Erving and awarded damages of £740. The liability of the collector to such a common law action does not appear to have been in dispute. The earlier proceedings in the admiralty court should have prevented such a verdict for Erving, because the issues once had been decided by a court of competent jurisdiction,[205] but the Massachusetts juries deliberately ignored the admiralty decision. Erving's victory, however, was short-lived. Cradock appealed to the privy council, in

[204] Quincy 553 (Mass. Prov. 1761).

[205] See Scott v. Shearman, 96 Eng. Rep. 575 (K.B. 1775).

which Erving did not contest the appeal but acknowledged full satisfaction of the judgment.[206]

The final result in *Erving v. Cradock* appears to establish that a decision of the admiralty court acting within its jurisdiction would be controlling in a subsequent common law action. Thus, Erving's attempt to create a new mode of resistance may not have been fully successful in this case, but many other similar actions were brought in an effort to hamper the collectors.[207] These cases show that liability of a tax collector to a common law suit was known in the colonies.[208]

The Parliamentary response to *Erving v. Cradock* was not an attempt to oust the common law courts' jurisdiction; that jurisdiction seems to have been recognized and accepted. Instead, Parliament provided protection for revenue officers in the form of a new statute that barred any action or suit if the admiralty court certified that there was probable cause for the seizure. If the admiralty court did not act, the plaintiff could still bring suit, but the potential recovery was limited to the ship or goods seized, and damages of two pence. The plaintiff was not entitled to costs, and the defendant officer could be fined no more than one shilling.[209]

In addition to case law, the debates on the adoption of the Constitution are another source of evidence for the background of the seventh amendment. The Constitution empowers Congress to tax[210] and to create a judicial system,[211] but it does not provide a method of tax collection or a procedure for challenging the collection. There are some references in the available material on the debates to taxes, tax collections, courts, and juries, but those references do not explicitly discuss the role of the jury in tax cases. They do reflect assumptions about the relation of the jury to tax matters and can provide evidence of the background of the seventh amendment. Caution is required before determining that the scattered history supports the position that the drafters expected the jury to play the role postulated thus far. Another commentator has suggested that some expected the jury would play a nullifica-

---

206 Quincy 553, 557 n.4.

207 C. UBBELOHDE, *supra* note 77, at 33-35, 165-77.

208 *See* W. NELSON, AMERICANIZATION OF THE COMMON LAW 17, 31-38 (1975).

209 An Act Granting Certain Duties in the British Colonies and Plantations in America, 1764, 4 & 5 Geo. 3, c. 15, §§ 46 & 47 (1764) (repealed 1867).

210 U.S. CONST., art. I, § 8.

211 U.S. CONST., art III.

tion role in federal tax matters similar to that expected in suits brought by British merchants to collect debts.[212] That role for the jury would be unusual and not grounded in the English law, but the use of the jury to defeat just debts due unpopular creditors was not grounded in English common law and consequently not openly discussed. As the following excerpts indicate, the jury does not appear to have been intended to nullify tax collection; it was assumed that the jury could be used to control tax officials by common law actions.

The need for a guarantee of jury trial to protect the citizens against the tax collectors of the new federal government was raised in the published letters of opponents of the Constitution, discussed in the Federalist defense of the Constitution, and debated at some length in the ratifying conventions of Virginia and North Carolina. One early attack on the Constitution was the speech of Luther Martin before the Maryland House of Delegates, an attack later expanded into his pamphlet *Genuine Information*.[213] Martin feared that the Constitution gave the federal government arbitrary power to impose whatever taxes or duties it pleased. Worse still, the officers appointed to collect the federal revenue would not be accountable to the states nor be subject to the jurisdiction of the state courts. Therefore, he considered the proposed federal courts, and saw a danger:

> [I]n all those cases where the general government has jurisdiction in civil questions, the proposed constitution not only makes *no provision for trial by jury* in the *first* instance, but, by its appellate jurisdiction, *absolutely takes away that inestimable privilege;* since it expressly declares the Supreme Court shall have appellate jurisdiction both as to law and *fact*. Should, therefore, a jury be adopted in the *inferior court*, it would only be a *needless expense*, since, on an appeal, the *determination* of that jury, *even on questions of fact*, however honest and upright, is to be of *no possible effect*.
>
> . . . .
>
> Thus, Sir, *jury trials*, which have ever been the *boast* of the English constitution, which have been by our several *State constitutions* so cautiously secured to us,—*jury trials*, which have so long been considered the *surest barrier*

---

[212] Wolfram, *supra* note 10, at 705-06.

[213] Martin, *Genuine Information* (1787) in SECRET PROCEEDINGS AND DEBATES OF THE CONVENTION 1 (1845), reprinted in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 172, 204 (M. Farrand ed. 1937).

> against *arbitrary power*, and the *palladium of liberty*, with the *loss* of *which* the *loss* of our *freedom* may be dated, are *taken away*, by the proposed form of government, not *only* in a *great variety* of questions between *individual* and *individual*, but in *every case*, whether *civil* or *criminal*, arising *under the laws* of the United States, or the *execution* of those laws. It is *taken away* in *those very cases*, where, of *all others*, it is *most essential for our liberty* to have it *sacredly guarded* and *preserved;* in *every case*, whether *civil* or *criminal*, between *government* and its *officers* on the one part, and the *subject* or *citizen* on the other.[214]

From this omission Luther concluded that

> every *arbitrary act* of the general government, and every *oppression* of all that *variety of officers* appointed under its authority, for the *collection* of *taxes, duties, impost, excise*, and other *purposes*, must be *submitted* to by the *individual*, or must be *opposed* with *little prospect* of *success*, and *almost a certain prospect* of *ruin*, at least in those cases where the *middle* and *common class* of citizens are interested; since, to *avoid* that *oppression*, or to *obtain redress*, the application must be made to one of the courts of the United States.[215]

The best known response to this and similar arguments is in *The Federalist* Number 83,[216] in which Hamilton developed several counterarguments:

> It has been observed, that trial by jury is a safeguard against an oppressive exercise of the power of taxation. This observation deserves to be canvassed.
>
> It is evident that it can have no influence upon the legislature, in regard to the *amount* of the taxes to be laid, to the *objects* upon which they are to be imposed, or to the *rule* by which they are to be apportioned. If it can have any influence, therefore, it must be upon the mode of collection, and the conduct of the officers entrusted with the execution of the revenue laws.
>
> As to the mode of collection in [New York], under our own Constitution, the trial by jury is in most cases out of use. The taxes are usually levied by the more summary proceeding of distress and sale, as in cases of rent. And it

---

[214] *Id.* 80-81 (emphasis added).

[215] *Id.* 82 (emphasis added).

[216] THE FEDERALIST No. 83 (B. Wright ed. 1961) (A. Hamilton).

> is acknowledged on all hands, that this is essential to the efficacy of the revenue laws. The dilatory course of a trial at law to recover the taxes imposed on individuals, would neither suit the exigencies of the public, nor promote the convenience of the citizens. It would often occasion an accumulation of costs, more burthensome than the original sum of the tax to be levied.
>
> And as to the conduct of the officers of the revenue, the provision in favor of trial by jury in criminal cases, will afford the security aimed at. Wilful abuses of a public authority, to the oppression of the subject, and every species of official extortion, are offences against the government, for which the persons who commit them, may be indicted and punished according to the circumstances of the case.[217]

Hamilton's discussion may be accurate, but it is incomplete and does not directly meet the objections. The precedents did not allow common law actions or jury trials on the amount of revenue to be raised, the amount of any particular assessment, or the object to be taxed. Distress and sale could be used to collect, so that a suit to compel payment of taxes was not required. The important issue was whether the citizen could bring a common law action against the tax officials if they collected a tax that was not due, which would constitute a civil action historically tried by a jury. Hamilton did not deny that the common law allowed an aggrieved citizen to bring a civil action; that issue was ignored in a weak assertion that the jury in a criminal case would provide enough control, at least if the tax officials willfully abused their authority. Contrary to the conclusion based on a first reading, *The Federalist* does not establish that the jury was not a safeguard against oppressive tax collections, because the real role of the jury was ignored by Hamilton.

The records from other state ratification conventions indicate that the common law jury did have a role in tax collections, although those records do not contain direct statements on the scope of judicial review of the decisions of tax collectors.[218] Most of the debate over the taxing power concerned the question whether the new Congress should have the power of direct taxation or should be required to rely on the states to raise and collect taxes to meet eral requisitions. There was no discussion on the narrow question whether a citizen could obtain redress in a jury trial if a federal tax

---

[217] *Id.* 522-23.

[218] *See generally* J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, ANTECEDENTS AND BEGINNINGS TO 1801, at 324-412 (1971).

collector mistakenly collected a tax that was not owed. The records do provide notes from related discussion concerning the need for a jury to control federal officials, which supports the conclusion that the delegates understood the law of 1788 to allow judicial review of the acts of tax collectors in common law actions. Although there is no assurance that the discussion by the delegates accurately reflects the finer points of judicial procedure, the debates seem to indicate a consistent assumption by the speakers.

In the Virginia convention, the issues of tax collection and juries were discussed at greater length than in any other state primarily because of the speeches of Patrick Henry. Henry's objections to the new Constitution included opposition to the unlimited power of taxation and a distrust of the assurance that "these powers, given to Congress, are accompanied by a judiciary which will correct all."[219] The judiciary was too weak because the judges were dependent on Congress, and the protection of a jury trial was not assured in the new federal courts. Henry feared that the protection of the jury in the state courts would not suffice, because any actions against federal officials would necessarily have to be in federal court.[220] These arguments by Henry, joined by George Mason,[221] were answered in the convention. Governor Randolph stated his belief that federal taxes would be collected in the same manner as state taxes—voluntarily or by distress. Federal collectors need not be feared because "such an officer would be amenable to the laws, like any other citizen. He is only protected by the law where he acts lawfully . . . ."[222] John Marshall also indicated his understanding that the federal official would be liable to a common law action, in either the federal courts or the state courts, because "[t]here is no clause in the Constitution which bars the individual member injured from applying to the state courts to give him redress."[223]

The most extensive discussion of the common law liability of officials was in the North Carolina convention, as supporters of the Constitution responded to the claim that an impeachment of the tax collector was the only remedy an injured citizen could seek.[224] Two

---

[219] 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 57 (J. Elliot ed. 1888).

[220] *See id.* 167-68, 326-27, 577-78.

[221] *Id.* 524-26.

[222] *Id.* 127. *See also id.* 121-22.

[223] *Id.* 554.

[224] We shall undoubtedly, for instance, have a great number of tax-gatherers. If any of these officers shall do wrong, when we come to

delegates responded that impeachment was unnecessary because the injured citizen could always "get redress by a suit at law." [225] James Iredell, then a Federalist delegate and later Associate Justice of the Supreme Court, explained more fully:

> Mr. Chairman, the objection would be right if there was no other mode of punishing. But it is evident that an officer may be tried by a court of common law. He may be tried in such a court for common-law offences, whether impeached or not. As it is to be presumed that inferior tribunals will be constituted, there will be no occasion for going always to the Supreme Court, even in cases where the federal courts have exclusive jurisdiction. Where this exclusive cognizance is not given them, redress may be had in the common-law courts in the state; and I have no doubt such regulations will be made as will put it out of the power of officers to distress the people with impunity.[226]

Governor Johnston later spoke in support of Mr. Iredell, observing:

> Mr. Chairman, impeachment is very different in its nature from what the learned gentleman from Granville supposes it to be. If an officer commits an offence against an individual, he is amenable to the courts of law. If he commits crimes against the state, he may be indicted and punished. Impeachment only extends to high crimes and misdemeanors in a *public office*. It is a mode of trial pointed out for great misdemeanors against the public. But I think neither that gentleman nor any other person need be afraid that officers who commit oppressions will

---

fundamental principles, we find that we have no way to punish them but by going to Congress, at an immense distance, whither we must carry our witnesses. Every gentleman must see, in these cases, that oppressions will arise. I conceive that they cannot be tried elsewhere. . . .

In answer to Mr. Taylor, Mr. SPAIGHT observed that, though the power of impeachment was given, yet it did not say that there was no other manner of giving redress—that it was very certain and clear that, if any man was injured by an officer of the United States, he could get redress by a suit at law.

4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 36-37 (J. Elliot ed. 1888).

[225] Mr. MACLAINE. Mr. Chairman, I confess I never heard before that a tax-gatherer was worthy of impeachment. It is one of the meanest and least offices. Impeachments are only for high crimes and misdemeanors. If any one is injured in his person or property, he can get redress by a suit at law.

Id. 37.

[226] *Id.*

> pass with impunity. It is not to be apprehended that such officers will be tried by their cousins and friends. Such cannot be on the jury at the trial of the cause; it being a principle of law that no person interested in a cause, or who is a relation of the party, can be a juror in it. This is the light in which it strikes me. Therefore the objection of the gentleman from Granville must necessarily fall to the ground on that principle.[227]

These few excerpts may not provide a complete picture in themselves, but they are consistent in their indication of which English precedents were known in the colonies. Equally important is the absence of any evidence that other precedent was followed in the colonies. There is nothing to indicate any understanding that the actions of tax officials would be immune from judicial review because administrative determinations would be conclusive. Similarly, there is no evidence that the Exchequer procedure of the extent was used to collect taxes in the colonies or that it was intended to be used to collect federal taxes without a jury under the new constitution.

The liability of tax collectors to common law actions developed in the English courts from the doctrine espoused in the *Case of the Marshalsea* [228] was the only theory upon which the case of *Erving v. Cradock* [229] could have been brought; it is also the only English precedent that would support the statements in the ratification debates that a federal official would be subject to an action in the state or federal court. The strong evidence that the founders understood and expected that taxpayers could obtain redress by a common law action against a tax official must therefore be taken as establishing that such actions were part of the common law for which the right to a jury trial was preserved by the seventh amendment.

C. *Liability of the Tax Collector: 1791-1835*

The United States Supreme Court did not determine whether a federal tax official could be sued by a taxpayer in a common law action until the issue was presented in 1836 in *Elliott v. Swartwout*.[230]

---

[227] *Id.* 48. *See also id.* 45-48.

[228] 77 Eng. Rep. 1027 (K.B. 1612). See text accompanying notes 186-90 *supra*.

[229] Quincy 553 (Mass. Prov. 1761). *See* text accompanying notes 204-09 *supra*.

[230] 35 U.S. (10 Pet.) 137 (1836). See text accompanying notes [illegible] *infra*.

The effect of the seventh amendment on such suits was not expressly considered by the Court until 1845.[231] The Court's silence on this issue from 1789 to 1836 does not prove that federal tax collectors were completely immune from common law actions. A large number of cases from the lower federal courts and the state courts illustrates that the English doctrine of liability to a common law action had been brought across the Atlantic and applied in American courts.[232]

For the initial period immediately following 1789, only limited evidence is available because of the incomplete reports of cases in the early years. State appellate opinions were not yet systematically reported, and even a complete record of appellate opinions would provide an insufficient picture of the work of the trial courts. Several early opinions indicate that tax collectors were sued in the common law actions of trespass or trover, but most of the opinions are too brief to provide a reliable guide to the finer points of then current doctrine.[233] Opinions by Judge James Kent in 1803 and by Justice Joseph Story in 1830 describe the legal doctrines more fully.

The opinions of the New York Supreme Court of Judicature in 1803 in *Henderson v. Brown*[234] present some of the best early analysis. The action was in trespass against a federal tax collector who had collected the federal land tax by a distress on $525 in cash found in plaintiff's building. In 1798 Congress had enacted the tax that taxed lands, dwelling houses, and slaves.[235] Dwelling houses were to be assessed in one manner, and all other land was to be assessed separately, but the same assessor acted on both forms of property. The assessor had assessed plaintiff's building as a dwelling house; plaintiff asserted the building was a theater that should have been assessed in the other list at a lesser value. The plaintiff had not followed the procedure for review of the assessor's action that was provided by the statute. Instead, plaintiff brought an action

---

231 In 1845 the Court decided Cary v. Curtis, 44 U.S. (3 How.) 235 (1845). *See* text accompanying notes 248-58 *infra*.

232 *See* cases cited in note 245 *infra*.

233 *See, e.g.*, Beacher v. Bray, 1 Root 459 (Conn. 1792); Belt v. Perry, 4 H. & McH. 348 (Md. 1799); Bergen v. Clarkson, 6 N.J.L. 352 (1796); Buchannan v. Biggs, 2 Yeates 232 (Pa. 1797); Wilcox v. Sherwin, 1 D. Chip. 72 (Vt. 1797). Statutes such as the Massachusetts law allowing commonwealth officers to plead the general issue and defend with evidence that the act was done in the execution of the office also indicate that common law actions against officials were known. Act of Feb. 25, 1793, Laws of Mass. 560.

234 1 Cai. R. 92 (N.Y. 1803).

235 Act to lay and collect a direct tax within the United States, ch. 75, § 11, 1 Stat. 600 (1798).

for trespass against the collector and relied on the recent English cases that recognized trespass against the collector as an available remedy to test tax liability. The court gave judgment for the defendant, but divided three to two. Four opinions are extensively reported, but the strongest and decisive opinion was that of Judge James Kent.

Judge Kent's opinion distinguished and reconciled the seemingly conflicting precedents advanced by the parties and other judges. The collector derived his authority from the assessors, so to Judge Kent the important issue was the scope of the federal assessors' jurisdiction. He reasoned that the collector could be held liable in a common law action if he or the assessors had exceeded their jurisdiction by taxing property not subject to the tax statute. The collector was not liable in this case because the assessors had not exceeded their jurisdiction; at most they had committed an error in exercising granted jurisdiction.[236] *Henderson v. Brown* confirmed that the federal tax collector could be sued in a state court in a common law action of trespass, even though the plaintiff lost on the merits.

In later cases the New York courts entertained other trespass actions against federal officers charged with exceeding their authority. At least one plaintiff successfully sued the federal collector of customs for the Port of New York;[237] other plaintiffs were unsuccessful because of pleading defenses or because the goods had been previously libeled and condemned in federal court.[238] None of the opinions indicated, however, that the federal officials were immune from suit. One action in assumpsit established that a shipowner could challenge the authority of the customs collector to demand a duty in the common law action of assumpsit brought to recover the amount paid.[239] The New York courts also allowed such actions against state and local officials. In 1816 the court affirmed a jury verdict for the plaintiff in an action of trover against a collector for a school district, who had levied upon and sold property of the plaintiffs.[240] Again the court distinguished between a want of jurisdiction and erroneous assessment, and found that the collector had acted without jurisdiction.[241] The statute involved

---

[236] Henderson v. Brown, 1 Cai. R. 92, 102 (N.Y. 1803).

[237] Woodham v. Gelston, 1 Johns. 134 (N.Y. 1806).

[238] Van Brunt v. Schenck, 11 Johns. 377 (N.Y. 1814); Sailly v. Smith, 11 Johns. 500 (N.Y. 1814).

[239] Ripley v. Gelston, 9 Johns. 201 (N.Y. 1812).

[240] Suydam v. Keys, 13 Johns. 444 (N.Y. 1816).

[241] *Id.* 446-47.

in the case authorized taxation of residents of the town of Munroe; the plaintiffs established at trial that they were residents of New York City.

The case law had solidly established the liability of a tax collector to the common law trespass action prior to 1830 when the issue arose before Justice Joseph Story in the circuit court in *Thurston v. Martin*.[242] The defendant Martin was the collector of taxes for Newport, Rhode Island; he had arrested and imprisoned Thurston for nonpayment of the town tax, a nonjudicial remedy authorized by the tax law. Thurston claimed he was not required to pay the tax because he was not a resident of Newport. The jury was instructed to find for the plaintiff if they determined he was not a resident of Newport, and the jury did find for the plaintiff for $505. Justice Story denied the motion for a new trial in an opinion that traced the English precedents starting with the *Case of the Marshalsea*[243] and the American cases including *Henderson v. Brown*. He concluded that an official was liable in trespass if the action was beyond the jurisdiction of the court, board, or tribunal, but he was not liable if he made a mistake or acted irregularly in the exercise of that jurisdiction.[244] The history summarized by Justice Story demonstrates that the common law courts were not completely excluded from tax collection matters. Administrative collection by nonjudicial means was employed and considered constitutional, but the administrative factfinding did not bar a challenge in the common law courts before a civil jury if the taxpayer claimed that no tax was owed.[245]

---

[242] 23 F. Cas. 1188 (C.C.D.R.I. 1830).

[243] 77 Eng. Rep. 1027 (K.B. 1612).

[244] Thurston v. Martin, 23 F. Cas. 1189, 1191 (C.C.D.R.I. 1830).

[245] Other reported cases from many states show that the tax collector was generally subject to common law liability if the taxpayer alleged no tax had been owed. Connecticut (Allen v. Gleason, 4 Day 376 (1810) (trespass and false imprisonment); Thomas Mfg. Co. v. Lathrop, 7 Conn. 550 (1829) (trespass); Prince v. Thomas, 11 Conn. 472 (1836) (false imprisonment and conversion)); District of Columbia (Farmers Bank v. Fox, 4 D.C. (4 Cranch) 330 (1833) (trespass)); Maine (Huse v. Merriam, 2 Me. 375 (1823) (trespass against assessor to challenge legality of tax); Massey v. White, 3 Me. 290 (1825) (trespass against assessors to challenge legality of procedure)); Massachusetts (Rising v. Granger, 1 Mass. 47 (1804) (assault, battery, and false imprisonment); Martin v. Mansfield, 3 Mass. 419 (1807) (trespass); Thurston v. Little, 3 Mass. 429 (1807) (trespass); Capen v. Glover, 4 Mass. 305 (1808) (trespass); Pease v. Whitney, 5 Mass. 380 (1809) (trespass); Agry v. Young, 11 Mass. 220 (1814) (pleading decision holding trespass is proper action and not case)); New Hampshire (Johnson v. Dole, 4 N.H. 478 (1828) (trespass); Cloutman v. Pike, 7 N.H. 209 (1834) (trespass)); New Jersey (Van Dien v. Hopper, 5 N.J.L. 764 (1820) (trespass)); New York (Saunders v. Springsteen, 4 Wend. 429 (1830) (case); Wheeler v. Anthony, 10 Wend. 346 (1833) (trespass)); North Carolina (Sears v. West, 5 N.C. 291 (1809) (trespass); Stewart v. Davis, 7 N.C. 244 (1819) (trespass)); Vermont (Bellis v. Hazeltine,

D. *The Tax Collector in the Supreme Court*

The Supreme Court did not decide whether a tax or customs official was liable in a common law action until 1836. When a case did reach the Court, the nature of the dispute was slightly different from that in most of the earlier cases; the common law action had developed as a procedure to contest whether any tax liability existed and not to contest the amount of the tax. *Elliott v. Swartwout* [246] was an action in assumpsit by an importer against the collector of the Port of New York to recover an overpayment of duties. The importer conceded that the goods were subject to duty but argued that the correct rate was ten percent and not the fifty percent levied by the collector. The opinion of the Court did not discuss the distinction in the earlier cases between collection of more than the authorized amount and collection when no tax was due.[247] The Court relied on the earlier English and state precedents to establish that the collector was personally subject to a common law action to recover an excess of duties, if the taxpayer gave notice of the claim of error at the time of payment. Thus the opinion recognized greater common law liability than seems required by the earlier cases and may have recognized a right to trial by jury in cases not included in the original scope of the seventh amendment.

The Supreme Court adhered to the rule in *Elliott v. Swartwout* for only nine years; in 1845 the Court reversed its position in *Cary v. Curtis* [248] and held that a cause of action for an overpayment could not be maintained against a collector. The stated reason for the change in doctrine was an 1839 statute [249] that required the collector to account immediately to the treasury for all duty collected. The Court reasoned that because the collector could no longer hold the money pending resolution of the action, it would be unfair to require the collector to refund money already paid into the treasury. The Court emphasized that *Elliott v. Swartwout* was not controlling because the 1839 statute had converted the tax collector from an

---

1 Vt. 81 (1828) (trespass); Waters v. Daines, 4 Vt. 601 (1832) (trespass)); Virginia (*See* Kinney v. Beverley, 12 Va. 318 (1808) (argument of Attorney General Nicholas and Randolph: "Where a man fails to pay his taxes, his *personal* estate, it is admitted on all hands, is liable to be taken and sold *without process*. . . . If the proceedings are irregular, he may bring a suit to recover it, and have all the benefit of a trial by jury." *Id.* 323-24)).

[246] 35 U.S. (10 Pet.) 137 (1836).

[247] In Whitbread v. Brooksbank, 98 Eng. Rep. 970, 972 (K.B. 1774), Lord Mansfield observed that an action for money had and received would not lie against an officer of revenue for an overpayment unless the defendant consented to the suit.

[248] 44 U.S. (3 How.) 235 (1845).

[249] Act of Mar. 3, 1839, c. 82, § 2, 5 Stat. 348 (1839).

agent of the federal government into a conduit for tax revenues.[250] Thus, the action in assumpsit for money had and received was no longer available because this common law action would lie only against an agent with the power to retain the funds he had collected for the principal. The Court attempted to allay fears expressed by the dissenting Justices by stating that "the answer to the assertion . . . [that] the party is debarred all access to the courts of justice, and left entirely at the mercy of an executive officer" [251] was that the taxpayer could bring suit under other common law causes of action such as replevin, detinue, and trover. This may be an inadequate response to the constitutional concern because these other common law writs all related to actions against one who had wrongfully taken goods and not money.[252] Thus a person who paid his taxes in cash might be excluded from a cause of action against the tax collector, while an individual whose goods were taken might still be able to bring an action. *Cary* can be read as establishing that there is no constitutional requirement that a taxpayer be able to bring an assumpsit action against a tax collector (whatever his relation to the government) for either an overpayment or a payment when no tax is due. Because the majority felt it could dispose of the case before it without explaining the constitutional issue, *Cary* should be read today as limited to its facts—an action for overpayment.[253]

---

[250] 44 U.S. (3 How.) at 241-42.

[251] *Id.* 250.

[252] *Trover* lay for damages for the conversion of specific personal property, where the plaintiff was entitled to the immediate possession thereof. *Detinue* lay for the recovery of a specific chattel wrongly detained (or its value—the option lying with the defendant), together with damages for its detention. *Replevin* lay to recover specific personalty wrongfully taken and detained, together with damages for its detention.

C. CLARK, LAW OF CODE PLEADING 80 (2d ed. 1947).

[253] The limited holding of *Cary v. Curtis* was recognized in DeLima v. Bidwell, 182 U.S. 1 (1901). Even though Congress had attempted to make the administrative decision final and had attempted to exclude the possibility of a common law action against the collector, note 267 *infra*, the Court held that in some cases a taxpayer could still bring a common law action to recover duty paid under protest. The dispute was not over the classification of the goods or the amount of duty; the plaintiff insisted that the goods were not imported at all so that the collector had no jurisdiction to assess any duty. The Court relied on *Elliott v. Swartwout* to hold that the action was properly brought. *Id.* 174-80. The seventh amendment was not discussed. *See also* In Re Fassett, 142 U.S. 479 (1892).

DeLima and *Fassett* have been distinguished in recent district and circuit court opinions as applicable only to the particular statute involved. *E.g.*, Argosy Limited v. Hennigan, 404 F.2d 14 (5th Cir. 1968); Akins v. Saxbe, 380 F. Supp. 1210 (D. Me. 1974). *See also* cases cited *id.* 1216. Neither *DeLima* nor *Fassett* has been overruled or limited by the Supreme Court, so both still affirm the vitality of the common law action preserved by the seventh amendment. The recent opinions do not discuss the seventh amendment issue, which cannot so easily be dismissed as a "somewhat aged judicial antecedent." 404 F.2d at 17.

The real problem in *Cary v. Curtis* is the mode of analysis adopted by the Court--analysis that emphasizes fine distinctions among the common law writs. It is the essence of the common law rights that is important. It is difficult to believe that the drafters of the seventh amendment sought to preserve the idiosyncracies of the common law system of writs. It is much more likely that the drafters were seeking to protect the fundamental rights that could be culled from the common law system, such as the right to bring suit against the collector of taxes, whatever the collector's relationship to the government. As Justice Story reminded the majority, the "government itself is not suable at all." [254] It was therefore important to assure that citizens would have some means of redress against the individual who acted for the government. The debates from the ratification period show [255] that the right to a jury trial was viewed as a means of protection against federal officials in federal courts. Justice Story pointed out in his dissent in *Cary*:

> [I]f Congress possess a constitutional authority to vest such summary and final power of interpretation in an executive functionary, I know no other subject within the reach of legislation which may not be exclusively confided in the same way to an executive functionary; nay, to the executive himself. Can it be true that the American people ever contemplated such a state of things as justifiable or practicable under our Constitution? I cannot bring my mind to believe it . . . . [256]

Justice McLean emphasized the absence of trial by jury: "The danger is in sanctioning the principle. . . . I object to it because it is dangerous and may be ruinous. It takes from the citizen his rights--rights secured to him by the Constitution; the trial by jury, in a court of law." [257] The dissents of the two Justices did not convince their brethren, [258] but they did find a receptive ear in Congress.

---

[254] 44 U.S. (3 How.) at 256.

[255] *See* text accompanying notes 213-27 *supra*.

[256] 44 U.S. (3 How.) at 253 (Story, J., dissenting).

[257] *Id.* 265-66 (McLean, J., dissenting).

[258] Justice Wayne dissented without an opinion, a fact not recorded by the Reporter. MINUTES OF THE SUPREME COURT OF THE UNITED STATES, *Cary v. Curtis*, Tuesday, January 21, 1845. The division was therefore 4-3; the opinion by Justice Daniel was supported only by Chief Justice Taney and Justices McKinley and Catron.

By the end of the next month Congress amended the statute interpreted by the Court [259] and expressly provided a right to a jury trial in actions against the collector for refunds.[260]

Customs duties do not directly affect the majority of citizens today; internal revenue taxes are more important. The potential common law liability of the collector was first recognized in an internal revenue case in *City of Philadelphia v. Collector*.[261] The issue in that case was whether the circuit court had jurisdiction over a removed action against the collector.[262] In its discussion finding jurisdiction, the Court stated that an action of assumpsit was the appropriate remedy to recover taxes assessed illegally or erroneously [263] and cited *Elliott v. Swartwout* and the related opinion in *Bend v. Hoyt*.[264] Since then, the right to challenge federal tax liability in a common law civil action has remained firmly established; in fact it is now so well established that the reason for it has been

---

[259] *Id.* *Cary v. Curtis* was decided on Jan. 21, 1845. Senator Huntington first mentioned corrective legislation on Jan. 23. CONG. GLOBE, 28th Cong., 2d Sess. 179 (1845). The bill was introduced on Jan. 27, with these remarks:

> Mr. Huntington, on leave, introduced a bill explanatory of the act making appropriation for the civil and diplomatic expenses of government for the year 1839.
>
> Mr. Huntington remarked that the judiciary had decided that the provision of the law of 1839, which this bill was intended to explain, took away the right of the importer to recover back moneys, or to try the question of right to recover back moneys, in any court of law or equity in any State of the Union, paid as duties on goods to the collector, under protest; and that this bill was intended to give the right to the importer to maintain action at law against the collector, or other person acting as collector, to ascertain and try the legality and validity of the demand for the payment of duties on goods, wares, and merchandise which are not authorized to be paid, in part or in whole, by law.
>
> Mr. Woodbury remarked that the proviso of the law of 1839 alluded to was not intended to bar the right of the importer to maintain a suit at law for the recovery of duties illegally collected, but to prevent the money thus collected from laying in the hands of the collector.
>
> Mr. Huntington said that such he knew was the intention of the law, and to give the power money illegally collected when that fact was established.

Id. 195.

[260] The Act was approved on Feb. 26, 1845, only five weeks after *Cary v. Curtis*. Ch. 22, 5 Stat. 727 (1845).

[261] 72 U.S. (5 Wall.) 720, 731-33 (1866). *See also* Erskine v. Van Arsdale, 82 U.S. (15 Wall.) 75, 77 (1872) ("Taxes illegally assessed and paid may always be recovered back, if the collector understands from the payer that the taxes are regarded as illegal and that suit will be instituted to compel the refunding of them.").

[262] 72 U.S. (5 Wall.) at 727-28.

[263] *Id.* 731.

[264] 38 (13 Pet.) 263 (1839). The defendant raised *Cary v. Curtis* as a defense, but the Court did not discuss the merits of the argument. 72 U.S. (5 Wall.) at 732.

forgotten.[265] This failure to recall the history of the action against the collector has led some judges to erroneous conclusions. For example, Justice Cardozo concluded that "[a] suit against a Collector who has collected a tax in the fulfillment of a ministerial duty is today an anomalous relic of bygone modes of thought."[266] A partial explanation is that by 1933 the history behind *Elliott v. Swartwout* and *Cary v. Curtis* had become less well known because Congress had attempted to take away the right to a jury trial in customs cases by providing an exclusive statutory procedure for challenging customs determinations.[267]

Today, federal taxes raise much more revenue and affect many more citizens more often than do customs duties. The effect of the seventh amendment on tax refund suits has been discussed very little recently. Constitutional analysis has been unnecessary for a quarter century because the right to a jury trial has been statutorily guaranteed since 1954, if the taxpayer pays the tax and sues for a refund in district court.[268] The relevant congressional hearings and reports trace the right to a jury trial to the common law precedents discussed in *Elliott v. Swartwout*[269] and make clear that the 1954 statute

---

[265] For example, the earliest twentieth century opinion discussed the right to jury trial only in a brief paragraph of dictum that concluded without careful analysis that "the right . . . to a jury [in a suit against the collector] is not to be found in the Seventh Amendment and the Constitution but merely arises by implication from the provisions of § 3226, Revised Statutes, which has reference to a suit at law." Wickwire v. Reinecke, 275 U.S. 101, 105 (1927). Later opinions repeated the dictum and enhanced the apparent authority of the conclusion, but again there was little analysis of the history of the action against the tax collector. *See, e.g.*, Phillips v. Commissioner, 283 U.S. 589, 599 n.9 (1931).

[266] Moore Ice Cream Co. v. Rose, 289 U.S. 373, 382 (1933).

[267] The Act of Feb. 26, 1845, c. 22, 5 Stat. 727 became § 3011 of the Revised Statutes of 1873. That section was repealed in 1890. Act to simplify the laws in relation to the collection of the revenues, ch. 407, § 29, 26 Stat. 141-42 (1890). At the same time Congress made the administrative decision final, *id.* at § 13, 26 Stat. at 136-37, unless review was sought in the circuit court, *id.* at § 15, 26 Stat. at 138, and declared that the collector was not liable to an ordinary civil action, *id.* at § 25, 26 Stat. at 141. The Supreme Court held that the statutory procedure was exclusive, and that the circuit courts had no jurisdiction to hear a common law action against the collector if the goods were actually imported and concededly subject to some duty. Schoenfeld v. Hendrichs, 152 U.S. 691 (1894); Arnson v. Murphy, 109 U.S. 238 (1883). It was still possible to bring some common law actions. *See* note 253 *supra*.

[268] 28 U.S.C. § 2402 (1970). The jury trial provision was added by Act of July 30, 1954, ch. 648, § 2(a), 68 Stat. 589.

[269] "[N]o one has seriously suggested that the right to a trial by jury be denied entirely. It has been retained in the form of a suit against the collector. That, incidentally, cannot be constitutionally denied the taxpayer, as I understand constitutional law." *Civil Actions in District Courts to Recover Taxes: Hearings on S. 252 Before a Subcomm. of the Senate Comm. on the Judiciary*, 83d Cong., 1st

was a reaffirmation of the common law liability of the tax collector recognized by the Supreme Court in 1836.[270] In 1966 Congress provided that suits for tax refunds in the district court must be brought against the United States;[271] if the taxpayer sues the collection officer, the United States must be substituted as the defendant.[272] This change in the caption of the suit may make the historical link with the common law precedents less obvious, but the seventh amendment would still guarantee a jury trial in such actions if the

---

Sess. 3 (1953) (statement of Elbert P. Tuttle, General Counsel of Treasury Department).

> Suits Against the Director
>
> The right to bring suit against one who illegally assesses a tax is not created by any statutory provision but derives from the common law, where it was a well-established principle that a person unlawfully exacting a sum from another could not avoid liability merely by showing that he had paid the moneys over to a third person. This rule of law, as applied to collectors of taxes, received early affirmation in the Federal courts of the United States.
>
> In *Elliott v. Swartwout* [10 Peters 137 (1836)], it was held that, where duties were paid under protest to the collector that they were too high, an action would thereafter lie to recoup the amount erroneously obtained. The Supreme Court cited as authority for this ruling, inter alia, the following: *Irving v. Wilson*, 4 T.R. 485 (1791); *Greenway v. Hurd*, 4 T.R. 554 (1792); *Sadler v. Evans*, 4 Burr. 1984 (1766); *Snowdon v. Davis*, 1 Taunt. 359 (1808); *Clinton v. Strong*, 9 Johns. 370 (1812); *Hearsey v. Fruyn*, 7 Johns. 179 (1810); and *Frye v. Lockwood*, 4 Cow. 454 (1825).
>
> In Erskine v. Van Arsdale, [15 Wall. 75 (1872)], the Supreme Court summarized the rule as it then existed as follows:
>
> > Taxes illegally assessed and paid may always be recovered back, if the collector understands from the payer that the taxes are regarded as illegal and that suit will be instituted to compel the refunding of them (p. 77).
>
> For all practical purposes, the proceeding against the collector is now a virtual fiction, for in those instances in which the collector or director as he is now called, has lawfully acted within his official capacity, the United States is the real party in interest and has assumed full liability. The artificial nature of the suit against the collector was recognized at an early date when the Federal Government, by statute, expressly provided that moneys recovered in an action against the collector for taxes exacted by him during the performance of his official duties would be paid out of the United States Treasury. [Rev. Stat. § 989 (Mar. 3, 1863); 28 U.S.C. 2006].
>
> There are two important considerations relating to personal suits against the director to recover taxes. The first, as noted before, is that this is the only remedy for obtaining redress against an overassessment in which a jury trial may be had.

H.R. REP. No. 662, 83d Cong., 1st Sess. 2-3 (1953).

See also H.R. REP. No. 659, 83d Cong., 1st Sess. 2 n.4 (1953) ("This right of action derives from the common law."), *reprinted in* [1954] U.S. CODE CONG. & AD. NEWS 2716, 2717 n.4.

[270] S. REP. No. 115, 83d Cong., 1st Sess. 3 (1953) ("This bill gives no new substantive rights to the taxpayers . . . .").

[271] I.R.C. § 7422(f)(1).

[272] *Id.* § 7423(f)(2).

United States Code did not. The 1966 statute was not an attempt by Congress to restrict the seventh amendment right to a jury; the seventh amendment issue was not discussed in the congressional reports.[273]

The common law preserved by the seventh amendment begins with the *Case of the Marshalsea* and spans the two centuries during which the common law courts in England expanded their jurisdiction to control the officers of the government. The common law of this period, including that of 1791, clearly recognized the right of a taxpayer to a jury trial in an action against the collector. Therefore, the precedents do not support the conclusion of Justice White in *Atlas* that "taxes may constitutionally be assessed and collected . . . with the relevant facts in some instances being adjudicated only by an administrative agency."[274] The seventh amendment preserves the substance of these common law rights, not just the form of the writs. Thus the amendment guarantees that a taxpayer may obtain a civil jury trial to determine whether the alleged tax is owed in an action brought to recover a tax after it has been paid to the collector. The constitutional right to a jury trial to contest the amount of tax due may be open to question, but the right to contest the basic liability for tax is preserved by the seventh amendment.

IV. The Future Direction of the Seventh Amendment Debate

The attempt in *Atlas* to carve out a new exception to the seventh amendment to permit administrative factfinding in public rights cases poses a serious threat to a fundamental guarantee of the Bill of Rights. A forthright attack on the seventh amendment has replaced the "silent approaches and slight deviations"[275] of the past.

[273] *See* H.R. Rep. No. 1915, 89th Cong., 1st Sess. 5-7 (1966); S. Rep. No. 1625, 89th Cong., 1st Sess. 6-7, *reprinted in* [1966] U.S. Code Cong. & Ad. News 3676, 3681-82. The United States was required as the named defendant instead of the actual collector because the 1966 legislation also required that all tax returns be filed with one of the seven regional service centers, and not with one of the 58 district director's offices. An action against the director of the service center could be brought only in the district where the director resided because of venue requirements, a rule which would concentrate tax actions in only seven federal courts and inconvenience to taxpayers forced to sue outside their home state. Instead of keeping the suit against the collector and amending the venue statute, Congress made the United States the named defendant so that the action could be brought where the taxpayer resided. The change was not described as an attempt to overrule the seventh amendment, but as "minor amendments designed to serve taxpayer convenience and preserve jurisdictional rules that are favorable to taxpayers in tax litigation." 112 Cong. Rec. 21,788 (1966) (remarks of Sen. Byrnes).

[274] 430 U.S. at 450.

[275] United States v. Boyd, 116 U.S. 616, 635 (1886).

> [I]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure.

Notwithstanding the asserted conclusion of *Atlas* that the Court will prevent Congress from making inroads into the seventh amendment,[276] there exists no standard to judge whether Congress has gone too far once the Court abandons the firm lessons of history. Precedent cannot provide any further content to the rule stated in *Atlas* because the rule is contrary to the common law precedents. Congress and the Court have tampered with the firm protection of the seventh amendment in the hope that an administrative agency will be better able than a court and jury to provide "speedy and expert resolutions of the issues involved."[277] The historical parallel is obvious but ignored by both Congress and the Court: the same demand for efficiency by the Crown resulted in the expansion of the admiralty courts in the colonies, a method for avoiding the common law jury so objectionable that it was a declared reason for revolution.[278]

The seventh amendment was added to the Constitution to preserve the common law right as fully as possible and to ensure that any future Congresses would be "rendered . . . powerless . . . to create new rights and remedies by statute and commit their enforcement, if it chose, to a tribunal other than a court of law—such as an administrative agency—in which facts are not found by juries."[279] The seventh amendment does not forbid the creation of administrative agencies; agencies that do not act in the nature of a common law court are outside the scope of the amendment.[280] The seventh amendment does not bar administrative factfinding even in matters similar to actions at common law;[281] the amendment only guarantees that the common law jury will be able to perform its historic function. Whether a modern procedure establishes a court, board, or agency that is a substitute for a common law court, and whether the common law jury had any historic function in such matters can-

---

This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Id.

276 430 U.S. at 461 n.16.

277 *Id.* 461.

278 "For depriving us, in many cases, of the benefits of trial by jury . . ." Declaration of Independence.

279 430 U.S. at 460.

280 See notes 137-40 *supra* & accompanying text.

281 See note 286 *infra*.

not be correctly determined by looking only at modern dicta that gloss over established distinctions. Every historical exception to the seventh amendment listed in *Atlas*—equity, admiralty, tax collection, military justice, and condemnation [282]—is an exception grounded in the specific history of each action at common law. As a group, these actions constitute simply a collection of discrete categories and not a public rights exception. The absence of such an exception compels the conclusion that *Atlas* was incorrectly decided. The only procedure that would comply with the seventh amendment would be enforcement by *de novo* civil action in a state or federal court.

The Supreme Court has not ruled an end to the debate over the application of the seventh amendment to the OSHA procedure and others similar to it. The *Atlas* opinion sets forth the strongest argument that can be made for excluding the jury, but the Court did not foreclose the possibility that further evidence could require reconsideration of the application of the seventh amendment to OSHA or similar procedures.[283] Two possible avenues for reconsideration are open on issues not decided in *Atlas:* (1) whether the OSHA procedure violates article III of the Constitution by assigning judicial power to a body that is not a court; and (2) whether the defendant can obtain a civil jury trial by paying the penalty assessed by OSHA and bringing an action for a refund.

The objection that the OSHA procedure violates the separation of powers doctrine because the agency is not a court under article III was the first issue stated in the petitions for certiorari filed by Atlas and Irey. Although it may be difficult to separate the article III and seventh amendment issues, the Court did so by limiting its grant of certiorari to the seventh amendment question. It is therefore still open to the courts of appeals and the Supreme Court to decide whether an agency can be given the adjudicatory power that *Atlas* approved without giving judicial power to a body other than an article III court.[284] Full discussion of the article III issue is beyond the scope of this Article, but many of the same cases that provide the history of the seventh amendment also supply the history for article III. Those agencies or executive officers who were allowed to find facts without a jury were either not acting in the nature of

---

[282] *Id.* 458. On condemnation actions, *see* 5 MOORE'S FEDERAL PRACTICE ¶ 38.31[1], at 233 (2d ed. 1977). On military justice, *see id.* ¶ 38.08[5], at 70 & n.50; H. MOYER, JUSTICE IN THE MILITARY 499 (1972).

[283] *See* 430 U.S. at 461 n.16.

[284] The courts of appeals have not yet read *Atlas* as an invitation to reopen the article III question. *See, e.g.*, Penn Dixie Steel Corp. v. Occupational Safety & Health Review Comm'n, 553 F.2d 1078 (7th Cir. 1977); Dorey Elec. Co. v. Occupational Safety & Health Review Comm'n, 553 F.2d 357 (4th Cir. 1977).

the common law courts (as in determining claims against the government) or, if acting in the nature of common law courts (as in determining how much was owed the government), were assessing taxes or duties. If the historic distinctions are observed, there is no precedent that would allow an administrative agency such as OSHRC to exercise the kind of adjudicatory power that *Atlas* implied had been given to the agency.

Although it may be unlikely that the Court will soon reexamine the same seventh amendment arguments presented in *Atlas*, the second avenue for reconsideration is open because the court in *Atlas* did not decide whether absence of the jury from factfinding in the first instance means that the jury is not required at any stage. Thus, it may be possible for an employer to obtain a civil jury trial by paying the OSHA penalty and bringing suit for a refund in federal district court. If the administrative procedure for enforcing OSHA determinations satisfies the seventh amendment only because OSHA civil penalties are analogous to taxes, then the OSHA penalties must also be subject to challenge in the same manner as taxes. This would allow the OSHRC to determine violations initially, just as the Internal Revenue Service has the unquestioned power in the first instance to find the facts administratively that establish the existence and amount of tax liability.

Under this procedure, employers charged with a violation of OSHA would have two alternative methods of obtaining review. Of course, the employer could use existing statutory review in the court of appeals; this would be the only method available if the employer does not want to pay the penalty in advance, but it would not allow a jury trial. Instead of seeking statutory review in the court of appeals, the employer could pay the assessed penalty and file an action against the Secretary of Labor for a refund.[285] Such an action would be a civil action for which the seventh amendment would guarantee a right to a jury trial. The only issue would be the factual question whether a violation had occurred and the amount of the penalty would not be open to relitigation.[286] A finding that no violation occurred would be a determination that the Secretary and Commission had exceeded their jurisdiction in de-

---

[285] Civil penalties are to be paid to the Secretary for deposit into the Treasury of the United States. 29 U.S.C. § 666(k) (1970).

[286] Most other federal agencies can collect civil penalties or forfeitures only by a *de novo* action in the federal district court; in such cases the federal courts have held that there is no right to a jury trial on the amount of the forfeiture. *See, e.g.*, United States v. Duffy, 550 F.2d 533 (9th Cir. 1977) (under Federal Aviation Act) (no discussion of seventh amendment).

manding a penalty.[287] A finding that a violation had occurred would sustain the jurisdiction of the Secretary and Commission and deny the employer a refund.

The similarity between the two methods of review for tax cases and the two suggested methods of review for OSHA cases is not accidental, for it is only the tax collection precedent that supports the *Atlas* exception to the seventh amendment right to jury trial. Congress cannot eliminate the opportunity to bring a refund action, as it cannot expand the nonjury exceptions beyond their reasonable limits, to the exclusion and at the expense of the right to jury trial.

Atlas, *Pernell*, and *Curtis* all imply that Justices White and Marshall continue to explore tentatively the extent to which administrative agencies can be given power to adjudicate cases without violating the seventh amendment. The argument that the language of the seventh amendment permits creation of the procedure in OSHA is not supported by "history and our cases."[288] The only reason given for such an assault on the amendment is concern over crowded federal courts[289]—"the tyrant's plea of the *necessity* of unlimited powers in works of evident utility to the public."[290] The work of the drafters of the Constitution and Bill of Rights should not be so lightly cast aside. They could not foresee how the new federal government would grow or how powerful it would become, but they were fearful of creating a national government that would reinstitute the abuses against which they had rebelled. The Constitution and the Bill of Rights provided for the separation of powers, limited judicial power to the courts, and as far as possible provided the protection of a civil jury. Congress may use its constitutional powers to expand the reach of the federal government and to create federal agencies more powerful than ever

---

[287] This Article has been limited to examining the history of the seventh amendment and the earlier opinions to determine if *Atlas* correctly determined that the seventh amendment did not apply. Once it is clear that there is a constitutional right to a civil jury trial, the question how the administrative determination and the civil jury trial should be related becomes important. What issues can be finally determined by the agency, what is open for relitigation in the trial court, and how the employer can obtain or waive rights are questions involving the murky area of res judicata and collateral estoppel of agency findings in later civil litigation. Under the classic doctrine the issue whether the Commission has jurisdiction to impose a penalty—which depends on whether a violation has occurred—would be open to full relitigation in court with no res judicata or collateral estoppel effect given to the agency finding of a violation. *See* RESTATEMENT OF JUDGMENTS § 10 (1942).

[288] 430 U.S. at 460.

[289] *Id.* 455.

[290] 3 W. BLACKSTONE, COMMENTARIES 74 (4th ed. 1770). Blackstone thus characterized the claim of the privy council that the sewer commissions could not be controlled by King's Bench, a claim Lord Coke and the common law lawyers finally defeated. *See* text accompanying notes 190-92 *supra*.

imagined in 1789, but Congress cannot escape from the limitations of the Constitution or the Bill of Rights.[391] If Congress wants increased federal adjudication in additional areas, Congress must provide more federal trial courts in which federal judges and civil juries may hear these suits at common law. Any less respect for the seventh amendment, as *Atlas* so dangerously invites, is a breach of faith.

---

[391] A jury could have competently determined whether a violation had occurred in *Atlas* or in *Irey*. No matter how complicated the safety rules may become, in the end they must be understood and followed by employees such as the roofer in *Atlas* and the pipe layer and construction superintendent in *Irey*. The expert testimony in such cases ought to be as understandable as in product liability or automobile accident cases.

The hostility toward the jury reflected in *Atlas* illustrates again a warning Professor Wolfram wrote which deserves repeating because too many judges are impatient with the civil jury:

> [T]he constitutional values represented by the seventh amendment are at a low state of importance in the minds of some, perhaps many, scholars. . . . The obvious implication . . . is that the seventh amendment jury in civil cases is such a drag on efficient judicial administration . . . and results in such inflated damage awards . . . that it should be avoided . . . except where the seventh amendment, rather narrowly conceived, compels otherwise.
>
> I cite this particular instance, not as pathological, but as typical of an attitude that must often color the perception and resolution of seventh amendment issues. Judges are not immune from the problem. See, e.g., Ross v. Bernhard, 396 U.S. 531, 544-45 (1970) (dissenting opinion). It is submitted that this is, at the least, rather unusual constitutionalism. The idea of rejecting the underlying values of a constitutional guarantee, or of viewing the guarantee as burdensome and thus to be restricted—if applied to other portions of the Bill of Rights—would certainly be rejected.

Wolfram, *supra* note 10, at 648-49 n.33.

Senator SIMON. Prof. Thomas D. Rowe, professor of law at the Duke University School of Law.

STATEMENT OF THOMAS D. ROWE

Mr. ROWE. Thank you, Mr. Chairman. With leave, I will just have my statement entered in the record. What I would like to do, since my dean, Paul Carrington, who was going to be here last Thursday is unable to be here today, is simply to begin by underscoring a few of the statements that he would have made had he been here today, the conclusions that were in his statement.

I might add incidentally that he is about to enter his last year as dean and my salary has already been fixed for next year, so I enjoy the kind of independence of mind that is meant to be assured by article III's guarantee that the salaries of judges cannot be reduced.

So I do not have to endorse his conclusions, but I do and I would like to share them with the committee. At various points in his statement he makes the following remarks: "I can say categorically that the present bill does not pose an issue of constitutional law." Incidentally, Dean Carrington is the person who wrote the article on trial by jury for the recently issued Encyclopedia of the American Constitution.

He further says, "The point," referring to *Atlas Roofing*, "therefore seems to be entirely settled. The seventh amendment has no application to administrative proceedings conducted under the aegis of the Secretary of Housing and Urban Development."

He concludes, distinguishing the policy issues from the legal ones, "It is not my role today," he would have said, "to weigh those competing considerations as they apply to fair housing cases. All that I can say is that the choice is yours and the choice is not impeded by the seventh amendment so long as the alternative forum is an administrative agency, not an article III court."

I think what I would like to do in the time that remains to me is to underscore what it seems to me are the key distinctions that are made in the Supreme Court cases and that may escape people or may be obscured, as I am afraid I feel they are in the statement of Mr. Kamenar.

To begin with, the Court has consistently and clearly and strongly maintained the distinction between administrative proceedings and proceedings in article III courts. The same kind of rights when adjudicated in article III courts that would have a right to trial by jury, the Court has very consistently held that they need not be tried by jury when they are relegated to administrative agencies.

As the Court concluded in *Atlas Roofing*, the seventh amendment is no bar to the creation of new rights—this is the kind of right we are talking about today that Congress has created—or to their enforcement outside the regular courts of law.

And I might add that the scheme approved by the Supreme Court in *Atlas Roofing* was one that did include penalties that could be enforced. In describing the scheme the Court said in *Atlas Roofing*, "The penalty may be collected without the employer's ever being entitled to a jury determination of the facts constituting the violation."

Of course, there are policy grounds on which to question whether that is a good idea, such as Mr. Kamenar has quoted from the article by Professor Kirst. But as far as the constitutionality is concerned, the Court has been extremely clear, strong and consistent in drawing the distinction between proceedings in court and proceedings before administrative agencies.

Second, another point that I would like to address is that even though it may be unique for punitive damages to be awarded by an administrative agency, the analogy is one that is so strong that I think there is no room for serious doubt that the Supreme Court would uphold it because *Atlas Roofing* upheld the administrative imposition of civil penalties without, as I have pointed out, any right to trial by jury.

What the Supreme Court did in *Tull*, where it also generally reaffirmed *Atlas Roofing*, was to equate the remedy of civil penalties to the remedy of punitive damages. So it has placed them very strongly on the same footing.

Sometimes reasoning by analogy can be tenuous; other times it can be very strong and clear indeed. To me, it seems there is very little doubt for assuming that there is any problem with punitive damages.

Third, I would like to underscore a distinction which addresses a problem that some people have raised, which is the possibility of eroding of the seventh amendment right to trial by jury entirely by letting Congress assign too many matters to administrative adjudication, and that is the problem of public rights and how they are defined in the cases.

Public rights is a somewhat deceptive term. It is a term of art that the Court has evolved and, in its usage, has applied to rights created by Congress. The distinction here is between rights created by Congress versus rights that exist under the Constitution or under State law.

It is as to rights under the Constitution and under State law that the problem has existed in the cases, not as to rights created by Congress, which is what we are talking about here today.

Thank you, Mr. Chairman.

[The prepared statement of Thomas Rowe follows:]

Statement of

Thomas D. Rowe, Jr.
Professor of Law
Duke University School of Law
Durham, North Carolina

Mr. Chairman and members of the Subcommittee, I am pleased to appear before you this morning to testify on the constitutionality of the administrative enforcement mechanisms proposed in S. 558, the Fair Housing Amendments Act of 1987. My name is Tom Rowe and I am a professor of law at Duke University, where I have taught, primarily in the fields of civil procedure, federal courts, and constitutional law, since 1973. Before that I was a law clerk to Associate Justice Potter Stewart, a member of the staff of another Subcommittee of your Committee, and in private practice with a Washington firm engaged primarily in federal court and administrative agency litigation. I have published articles on aspects of federal court jurisdiction and procedure, and my course teaching includes several of the very cases that are relevant to the issues before you today. I am a member of the American Law Institute and have served on the Board of Advisers for its recent Preliminary Study of Complex Litigation.

The question I am addressing, the constitutionality of the proposed Act's administrative enforcement provisions, is of course only one of the many issues before you as you consider this bill. By "constitutionality," I refer to the likelihood that the Supreme Court would uphold or strike down these provisions, on the ground that they impermissibly deny trial by jury or grant adjudicative authority to a non-Article III tribunal. I feel I can say with high confidence that there is no substantial likelihood that the Supreme Court at any time in the foreseeable future would hold any of the bill's administrative enforcement provisions unconstitutional on such grounds, or any other grounds

that I can imagine. You may therefore deliberate and vote without concern that passage of this bill would violate the Constitution as historically or presently interpreted by the Court, or that judicial invalidation of the proposed enforcement scheme would lead to the sort of problems Congress faced in the last several years with the bankruptcy law revisions.

Concerning the legality of the proposed scheme, I can readily endorse the exhaustive legal study and conclusions of Professor Arthur Wolf, who is also appearing before you today. To state briefly the reasons why administrative enforcement as in this bill does not violate the Seventh Amendment's right to trial by jury in civil cases: Although that right is even interpreted broadly within the context of trials in law (Federal Article III courts, e.g., Curtis v. Loether, 415 U.S. 189 (1974)), it has never been held to extend to federal administrative agency proceedings, including administrative adjudication of legal rights that had been or could be enforced in federal courts where trial by jury would be required. Instead, the Supreme Court has consistently upheld nonjury administrative adjudication of rights created by legislative action, e.g., Atlas Roofing Co. v. Occupational Safety & Health Review Commission, 430 U.S. 442 (1977). Such constitutional schemes have included ones, like that in S. 558, enforcing statutory rights to the benefit of private claimants. E.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

In most respects, the constitutionality of S. 558's nonjury administrative enforcement provisions is settled by prior holdings of the Supreme Court that are squarely in point. The one provision I know of for which no direct precedent exists is that in proposed § 812(f)(2)(B) for awards of punitive damages by the administrative law judge hearing a charge brought by the Secretary under proposed § 810(g)(2). Here, however, the argument by analogy to what the Court has previously approved seems too strong to leave room for substantial doubt. Atlas Roofing upheld

administrative imposition of civil penalties, subject of course to the writ of judicial review provided for in S. 558. The Supreme Court's opinion this spring in Tull v. United States, 107 S. Ct. 1831 (1987), stated that "the remedy of civil penalties is similar to the remedy of punitive damages." Id. at 1838 n.7. Thus it seems extremely unlikely that the Court would now disapprove administrative imposition of punitive damages. To summarize, in the words of the Court's Atlas Roofing opinion, "The Seventh Amendment . . . was not to be the creation of new rights or to preserve old ones unknown to the common law." 430 U.S. at 455.

. . . [illegible] constitutionality of S. 558's administrative enforcement provisions will undoubtedly be questioned. [illegible] cases, cases in which courts [illegible] to which Congress can assign federal administrative authority to non-Article III federal tribunals. The law on the frontiers of this area is indeed hazy, but there are many large zone areas in which Congress' authority is not subject to serious question. I see no reason to think that the scheme proposed in this bill comes anywhere near raising the problems found in the borderline cases. Some confusion resulting from earlier fractionated decisions has been cleared up by more recent majority opinions from the Court, particularly in Commodity Futures Trading Commission v. Schor, 106 S. Ct. 3245 (1986). Schor upheld federal agency adjudication of a state law counterclaim by the CFTC and listed the factors relevant in such cases:

> the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.

Id. at 3259.

The case for the constitutionality of S. 558's administrative enforcement scheme under these criteria and the Court's precedents strikes me as very strong indeed, and because of the precedents perhaps even stronger than it might initially appear on a reading of the Schor extract. The Court has been most deferential in permitting the assignment of initial hearings on rights created by Acts of Congress, as opposed to constitutional or state law claims, to non-Article III federal tribunals. It is, of course, with such federal statutory rights that this bill deals. Further, when Congress has chosen non-Article III federal adjudicators for such reasons as agency expertise or the danger of court congestion, both reasons that apply in this situation, the Court has been strongly inclined to credit those reasons and to uphold the scheme.

Indeed, it can be too easy to overlook that in cases like Schor the problem is normally not with assignment of the federal statutory claim itself to agency adjudication but rather with peripheral matters like state law counterclaims. As the Court said in that case, Congress's "decision to endow the CFTC with jurisdiction over . . . reparations claims [for commodity trading violations] is readily understandable given . . . the obvious expertise that the Commission possesses . . . . This reparations scheme itself is of unquestioned constitutional validity." 106 S. Ct. at 3260 (citing three other Supreme Court cases).

Finally, the limitation of agency adjudication to specific types of claims and the provision for judicial review have sufficed to meet the concerns for reserving the "essential attributes of judicial power" to Article III courts and for the breadth of jurisdiction and powers in the administrative tribunal. Serious question has arisen only in much more extreme situations, such as the delegation of wide powers over state law claims to non-Article III federal bankruptcy judges that was invalidated in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). The more recent decisions, the

similarity of this scheme to other valid delegations of initial adjudication to federal administrative agencies, and the limits on the scheme proposed by S. 558 make it quite clear that separation of powers should not, any more than the Seventh Amendment, be a constitutional obstacle to the validity of the measure.

Senator SIMON. Thank you.

We have a vote on, but I think we can hear your testimony, Mr. Nageotte, and then we will take a recess for members to go over and vote.

Mr. Richard R. Nageotte, of Woodbridge, VA.

STATEMENT OF RICHARD R. NAGEOTTE

Mr. NAGEOTTE. Mr. Chairman, members of the subcommittee, I appreciate the opportunity to be here today. I do not look like Fawn Hall, so obviously I am here because I was counsel of record in the *Tull* case.

I would just like to take this opportunity to make a personal note of the fact that I went through with Mr. Tull the personal anguish of himself and his family as he struggled to the Supreme Court of the United States, and I can testify not only on the importance of the right of trial by jury under the seventh amendment, but also the fact that there is governmental oppression and it is alive and well in this country.

I would like to point out that I must disagree with Senator Kennedy. I believe the *Atlas Roofing* case does preclude the Senate 558 action and remedies, for the sole reason that it constitutes a private right of action as opposed to a public right of action.

Under *Atlas Roofing*, the Supreme Court, both in footnote 7 and, depending on what volume you use, if you refer to 51 Law Ed 2nd at page 472, the Court discusses the limitations of *Atlas* in the public rights area.

Also, compensatory damages are private rights remedies, and the Supreme Court has said in *Curtis-Loether*, *Tull*, and other cases that it is the remedy as well as the cause of action that is important in making that determination.

Next, as a taxpayer I would like to address the cost of the ALJs that could be set up under this bill and in other agencies. It is just incredible to me as a taxpayer in this country that as this country rushes toward bankruptcy we continue to spend to duplicate courts, agencies, bureaucracies, and have no restraint at all in this area.

It would seem to me that by simply putting in a few extra dollars into the Federal district court system for a few extra judges, leaving your enforcement of your federal statutes in those areas, it would be far less expensive and it would seem to me to be far more beneficial to the taxpayers.

I would like to point out that I have been involved in representing people who are forced to go through the administrative process. Anyone who believes that the agency that makes the rules and reg-

ulations, prosecutes, and is the judge and the jury in cases with no limitations on punitive damages, such as this case or in high civil penalty cases, is a fair and equitable agency, simply has no experience in this field of the practice of law.

I would also like to point out the importance of trial by jury. I have been practicing law for many years. I am not a law professor, and for the first time in my life I have an opportunity to disagree with the law professors.

I have practiced in front of juries, in front of judges in all appellate courts, including the Virginia Supreme Court and the United States Supreme Court, and I can tell you unequivocally of the importance of the right of trial by jury.

As Senator Thurmond indicates, trial by jury does reflect the sense of the community. A jury will not allow the government to get away with oppression and it will not allow another one of its citizens to oppress. The jury is a tremendous sounding board for that type of control.

I would also point out that the number of persons on a jury also tend to reflect a consensus among people which reaches the best possible results. The extremes in the jury process are generally disregarded in the vote by the numbers. Just as this committee probably finds in its own deliberations, the extremes are sometimes eliminated and the end result constitutes the best possible ground for action.

Finally, I would just like to point out that the jury trial under the seventh amendment as we find it today comes from the Magna Carta. It was probably the most important beginning of justice for the average citizen not only of England, but also ultimately this country.

Alexander Hamilton in the Federalist Papers pointed out that the lack of the seventh amendment right of trial by jury was probably the largest single impediment to passage of the Constitution of this United States 200 years ago. I find it absolutely incredible, gentlemen of this committee, that on the 200th anniversary of the Constitution that we would have to really spend a lot of time debating the importance of trial by jury under the seventh amendment of the Bill of Rights of the Constitution of this country.

Senator SIMON. We thank you.

[Information submitted for the record follows:]

NAGEOTTE, BORINSKY & ZELNICK, P.C.
ATTORNEYS AT LAW
14908 JEFFERSON DAVIS HWY
WOODBRIDGE, VIRGINIA 22191-3997

703 491-4136
NO. VA. & D.C. Metro 690-1213
MD. Metro 843-2202

RICHARD R. NAGEOTTE
DANIEL H. BORINSKY
ROBERT J. ZELNICK
RONALD C. McCORMACK

G. DAVID TYREE
(1943-1975)

May 28, 1987

The Honorable Orrin G. Hatch
United States Senate
SR-135 Russell Senate Office Building
Washington, DC 20510

RE: Fair Housing Amendments Act of 1987
Senate Bill S-558

Dear Senator Hatch:

I am writing you because I will be out of town during the week of June 1 and unable to attend the subcommittee hearings on the above referenced bill. I am advised that the subcommittee will be considering amending the enforcement provisions of the Fair Housing Act to provide for the imposition of civil penalties and/or other enforcement mechanisms through the use of the executive rather than the judicial branch of government. It is my understanding that these amendments are being considered because of the Supreme Court's recent decision in the case of Tull v. United States, Record Number 85-1259. As the attorney of record for Mr. Tull, I am very concerned that the Senate is considering circumventing the protection of the right of trial by jury under the Seventh Amendment.

I concede that under the case of Atlas Roofing, the Supreme Court has allowed Congress to provide for enforcement of federal statutes including the imposition of civil penalties in the administrative branch of government without the right of trial by jury. However, I submit that Congress should not use administrative enforcement to circumvent the cherished right of trial by jury granted to the citizens of this country as protected by the Seventh Amendment of the Constitution. The Seventh Amendment represents a compromise reached between the Federalists and Anti-Federalists two hundred years ago to protect the citizens of this country from a number of abuses which included oppression by the existing government under the Crown. Historians agree that without this compromise the Constitution would not have been ratified by the states. It is most distressing that in the year of the 200th anniversary of the Constitution, members of Congress who hold themselves out as liberals and perceive themselves to be civil libertarians are advocating circumvention of the Seventh Amendment's protection of trial by jury.

Putting aside for the moment my firm commitment to preservation of the right of trial by jury and my dismay that members of Congress seek to avoid it, I would like to address the economic realities and injustices which occur when enforcement of a federal statute is placed in the executive branch of government. The cost to the taxpayers of administrative enforcement increases because an entire, newly established, bureaucracy of administrative law judges and support staff is required rather than using the currently existing federal court system. While an argument can be made that the current federal court system is overburdened, a cost benefit analysis would quickly demonstrate that additional workloads imposed on the federal judiciary can be remedied by funding at substantially lower levels than required to establish a new administrative law judge corp within the agency responsible for enforcement. Costs are multiplied further as each agency charged with administrative enforcement of a statute establishes its own administrative court system.

An additional but equally important consideration is fairness in the treatment of the citizens of this country who are already over regulated and subject to governmental oppression by an over zealous bureaucracy. Anyone who believes that a citizen defending an enforcement action at the agency level is granted a fair and impartial trial simply has no experience with the system. I can provide a case in point. Sometime ago I represented a client in an enforcement proceeding brought before an Administrative Law Judge in the Department of Housing and Urban Development, Office of Interstate Land Sales Registration. The action concerned the proposed suspension of a Statement of Record. In that case the Office of Interstate Land Sales Registration was attempting to suspend the Statement of Record and Property Report because a developer who correctly represented in the Statement of Record and Property Report that a golf course and golf pro shop was one hundred percent completed, did not report that the golf pro shop was not stocked with golf clubs and golf balls which the agency considered necessary to the game of golf. Needless to say, both my client and myself were upset when the Administrative Law Judge and the prosecuting attorney for the agency discussed, during the hearing, where they would be going to lunch together, the Administrative Law Judge sustained all of the objections of the attorney for the agency, denied all of my objections and ultimately suspended my client's Statement of Record and Property Report. This case would be humorous if it had not resulted in a needless expenditure of financial resources by both my client and the government over a ridiculous issue.

While this case example is not typical of all enforcement cases tried by Administrative Law Judges, it represents the abuses which can easily occur when Congress provides for administrative enforcement of statutes. I submit that a fair and impartial trial is impossible when the same agency charged with establishing the regulations and responsible for their enforcement, also acts as prosecutor, judge and jury. The natural tendency of any newly formed element of the bureaucracy is to continuously expand itself, creating its own empire and sphere of influence. Given these incentives, abuses are inevitable.

In the Tull case, Mr. Tull was subjected to potential civil penalties which could have exceeded $22,000,000.00. Mr. Tull's case was even more egregious because at the beginning of his filling activities, he requested and received a jurisdictional inspection of the work by the Corps of Engineers. The work being done by Mr. Tull was inspected by the District Engineer and eight members of his staff, including two attorneys whose responsibility included jurisdictional determinations. Mr. Tull was not told any permits were necessary. Five years later, after the work was completed under the constant surveillance of the Corps of Engineers, suit was filed against Mr. Tull for these enormous civil penalties. You and your colleagues should ask yourself, and then honestly answer, whether you as citizens of this country faced with potential civil penalties which could exceed $22,000,000.00, would trust adjudication of the facts of the case and the imposition of the amount of the penalty to the agency that established the regulations and also acts as prosecutor, judge and jury. If you answer this question honestly, you will agree that a trial by jury as guaranteed by the Seventh Amendment of the Constitution of the United States is a protection necessary for the citizens of this country. This protection should not be discarded in favor of agency enforcement of penalties which can, and I predict will, destroy many citizens of this county.

It is respectfully requested that you share my views on this issue with your colleagues and it is my hope that in all enforcement provisions of federal statutes the right to trial by jury will be preserved. As an attorney with twenty years experience representing citizens of this country, I find the Federal Government of today to be no less oppressive than the Crown two hundred years ago at the time of our Declaration of Independence and Constitution. If anything, I find the current situation to be far more oppressive. There exist today a morass of federal, state and local laws, ordinances and regulations far beyond the capacity of even a skilled attorney to keep track of all of them. Obviously they have exceeded the capacity of the average citizen to comply. I find that many citizens daily violate laws and regulations without even knowing they are doing so. This leaves them to the mercy of their government and the bureaucracy to determine when their status will change from average citizen to violator and defendant, subject to penalties which in many cases can destroy them and their families forever. For all of its shortcomings, the civil jury provides the last hope of protection for these citizens. When this protection is stripped from them they will be left to the mercy of a bureaucratic process in which the prosecutor, judge and jury become one, without effective right of appeal.

Thanking you for the opportunity to comment on this most important matter. Please keep me advised of the status of the above referenced bill and permit me to comment or testify concerning the importance of the Seventh Amendment to the citizens of our country. With kindest regards, I remain

Very cordially yours,

Richard R. Nageotte

RICHARD R. NAGEOTTE

RRN/jkb

Senator SIMON. When I said there was a vote on, apparently one of our lights is missing up here and that was a quorum call and not a vote.

Senator Thurmond.

Senator THURMOND. Professor Kamenar, first let me say that I appreciate your analysis of this issue. I read these cases in a similar manner. Under S. 558, if a recalcitrant respondent refuses to pay an award against him, how is such an award executed?

Mr. KAMENAR. Well, according to the current provisions under 812, it says that basically if the ALJ makes the award of damages and other relief that it can be reviewed in the circuit court of appeals for enforcement.

So it would seem that the Attorney General would go to the court of appeals to enforce the order of the ALJ. Now, obviously, in the court of appeals there are no jury trials there. So what I am suggesting is that this bill short-circuits the right to a jury trial by allowing the court of appeals to affirm, modify or set aside the ALJ award.

What I am suggesting is that even if the court of appeals does that and the person still refuses to pay, I think that what is going to have to happen is, as whenever somebody owes the government any money, for example, student loans owed where we see suits being filed every day, that it has to be an action in the district court, which is an action in debt.

At that point, the *Tull* case is very clear. A right to a jury trial attaches. I do not know whether the court of appeals can dispatch Federal marshals to seize assets of people who owe money to the government. That is done by the trial courts, by the district courts. So this mechanism, I just do not think jibes with the seventh amendment.

Mr. ROWE. Mr. Chairman, may I ask a question about the ground rules? Since we constitute a panel, if some of us have comments——

Senator SIMON. We would be pleased to have your response, unless Senator Thurmond has any objection. We are on his questioning time.

Senator THURMOND. No, I would have no objection.

Mr. ROWE. I think the way that a proceeding such as Mr. Kamenar was describing would work as a matter of procedural law is that if the court of appeals were to affirm the finding of the administrative law judge and there were to be a refusal and there would have to be a collection action, that would be a collection action in the district court to which the seventh amendment would apply as a general matter.

However, the legal issues and the factual issues would have been settled by the prior proceeding. Therefore, it would be res judicata and there would be summary judgment in favor of the people trying to collect the penalties.

The seventh amendment is no bar to the existence of summary judgment proceedings. If there is nothing for a jury to try, you do not get a right to trial by jury even if it is generally the kind of action in which the right to trial by jury does apply.

That, it seems to me, is the way this sort of thing would work when there was a collection action to enforce an affirmed judgment

by the court of appeals. So, technically, it would apply, but there would be nothing for a jury to try.

Senator THURMOND. Professor Kamenar, would this execution action, in and of itself, necessitate a jury right?

Mr. KAMENAR. I am sorry, Senator. I did not hear the question. Could you please repeat it?

Senator THURMOND. Would this execution action, in and of itself necessitate a jury right?

Mr. KAMENAR. Well, I think that is where we probably differ. I differ with Professor Rowe here that I would think that, as he said, a jury trial would be afforded. He mentioned that it would be res judicata. I do not think that necessarily would be the case.

The Supreme Court has never dealt with this precise issue although it would have had if the Atlas Roofing Co., for example, had refused to pay the fine and the Secretary of Labor in that case would have filed a civil suit.

Again, I do not think that the seventh amendment can be short-circuited merely by setting up an ALJ and having that be the res judicata mechanism when, in fact, the seventh amendment guarantees the right to a jury trial.

Certainly, though, I would agree to this, that even if you have a jury trial there are ways to have motions for summary judgment. You can have discovery and other things like that where the facts are pretty clear.

But in some of these cases, especially these types of discrimination cases dealing with credibility of witnesses—did this person have this apartment available, was it not rented to this person because of race, who said what to whom—those are highly disputed factual issues.

It is not like did somebody owe a loan on a student loan, and even there you are entitled to a jury trial. So I think all the more so in these cases, the execution would require a jury trial.

Mr. ROWE. Those are the issues that would be regarded as settled by the prior proceeding.

Mr. WOLF. Mr. Chairman, could I add something there? Regarding Senator Thurmond's question on whether execution of the judgment would be subject to jury trial, it seems to me the *Tull* case is dispositive.

I think you should look at the proceeding in three stages. The first stage would be a determination of liability, and *Tull*, of course, held that is triable to the jury. The second stage is the assessment of the damages or the civil penalty. The *Tull* case also held, as Senator Specter pointed out, that the right of jury trial does not apply to the assessment of damages.

The third stage would be execution of the judgment. Since the Supreme Court held in *Tull* that you are not entitled to a jury trial on the assessment of the damages, then you would not be entitled to a jury trial on execution, which is farther down the line from a determination of liability and damages.

So it seems to me *Tull* is dispositive on the question of the execution being subject to the seventh amendment.

Mr. NAGEOTTE. Senator Thurmond, if I could add on that point, first of all let me tell you from my experience that any appellate right which comes under a Federal statute which limits the appel-

late court's review such as S. 558 does, what happens in the circuit courts on appeal is that there is no effective right of appeal to the factual determinations.

The courts determine that this is absolutely jurisdictional. If Congress limits their review, then they impose that jurisdiction upon themselves. So you will have no right of appeal.

Whatever this governmental agency does, be it ever so far out and crazy, as long as there is any evidence on the record—and that is the key, any evidence on the record, and that can be the most incredibly weak evidence—that unjust result could end up being affirmed, and probably would end up being affirmed on appeal.

I quite frankly do not share Mr. Kamenar's optimism on the issue of obtaining a right of trial by jury at the enforcement stage of the proceedings. I think at that point in time the courts would take the position that the factual determinations have been made and there would be no right of jury trial at that point.

If you look to the Supreme Court's decision in the *Parklane Hosiery* case in which the Court found that the seventh amendment could be circumvented by the doctrine of collateral estoppel, with only Chief Justice Rehnquist dissenting, I think you may find that that would be the ultimate end result of this argument.

So I think you are going to end up with a bad situation if this bill passes as it is.

Senator THURMOND. Professor Kamenar, do you think the choice of the court of appeals as a reviewing and enforcing court is just a further attempt to avoid a jury right by using a judicial forum which is unaccustomed to jury trials?

And coupled with the dual administrative process which really parallels the private cause of action found to require a jury trial in *Curtis*, do you think this form of review in the court of appeals can be seen as evidence that this bill is an attempt to simply avoid the jury right?

Mr. KAMENAR. That is precisely my position. Again, I think if you look at the teachings of *Curtis* v. *Loether*, which dealt with title VIII, which is what we are talking about today, Justice Marshall said that the nature of the action involved is one of an action at law and the nature of the remedy for damages or penalties is also one at law, and that is what the *Tull* case says.

I think by trying to set it up through the court of appeals, you are circumventing and eviscerating the seventh amendment. I might note in *Crowell* v. *Benson* the Supreme Court—although that dealt with an admiralty case, it specifically put judicial gloss on that, saying judicial review must be de novo.

In fact, Justice Brandeis dissented from *Crowell* v. *Benson* because the Supreme Court was giving too many rights to the person there in terms of de novo review. So what this bill does is not only short-circuit the seventh amendment right in the court of appeals, it does not even have the court review de novo the facts, but merely questions of law. So that is precisely my position, as you state it.

Senator THURMOND. I believe you and Mr. Nageotte join Professor Kirst in believing that a jury trial is always required when the government seeks civil penalties. Is your opinion further strengthened if the government seeks damages, both actual and punitive,

which would go to a private party rather than fines which go to the public treasury?

Mr. KAMENAR. Precisely. I think because of the additional nature of these damages; namely, it inures to the benefit of a private party rather than civil penalties which go into the Government Treasury—this is not a public right, as Atlas Roofing made the dichotomy.

In other words, I disagree with *Atlas Roofing*, as do Professor Kirst and Mr. Nageotte. But I would go further and say that even assuming *Atlas Roofing* is correct, it makes the dichotomy between private right and public right and, quite frankly, I do not think Professors Rowe or Wolf really made any argument why this is not necessarily a private right, since it is the person getting the money and they are defined as the aggrieved person under this particular bill.

Senator THURMOND. Mr. Nageotte, is that your position?

Mr. NAGEOTTE. Yes, Senator Thurmond, that is absolutely my position, and I think that S. 558 even goes much further than violating—I do not think it would pass muster at all under *Atlas Roofing* because it goes much further than the statute in *Atlas Roofing* did in terms of the private rights aspect and I think that absolutely takes it out.

If you read *Atlas Roofing* carefully, you will find that the distinction in these cases is a public rights case versus a private rights case, and there is no question in my mind but what 558 is just a private rights bill.

Senator THURMOND. Mr. Chairman, I had some questions of these other two witnesses, but I expect my time is up, if you have any questions.

Senator SIMON. The time is technically up, but let me go ahead and yield to the distinguished former chairman of the full committee and then I will have some questions.

Senator THURMOND. Thank you.

Professor Wolf and Professor Rowe, if you will answer this question: You claim the Constitution allows Congress to delegate even private rights to administrative proceedings. This seems to fly in the face of the *Atlas* case, which clearly draws a distinction between public and private rights and which claims any other reading overstates the Court's precedents.

Do you think the Court's language here is merely superfluous?

Mr. WOLF. Let me begin, if I could, Senator Thurmond. My view would be that this bill does, in fact, comport with the Supreme Court's definition of public rights; that is, the definition the Court offered in *Atlas Roofing*, which is a case in which the government "sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact."

Certainly, in this proceeding the government is suing. It is the Secretary of HUD who is bringing the proceeding against a private individual. Certainly the secretary is acting in a sovereign capacity pursuant to a presumably constitutional act of Congress; that is, the underlying title VIII is certainly constitutional. So it seems to me that S. 558 does comport with the public rights definition offered by the Supreme Court.

In addition, I should add that the Supreme Court, although it has articulated public rights as one of the criteria for determining whether acts such as this are constitutional, has approved administrative enforcement when the remedy benefited the private individual.

Now, it is true in *Atlas Roofing* the remedy benefited the government; the civil penalty went to the U.S. Treasury. However, in *Crowell* against *Benson*, any money awarded there would have gone to a private individual out of the pocket of the employer and would be given to the employee.

The two recent cases the Supreme Court decided, the *Thomas* case in 1985 and the *Schor* opinion in 1986, both written by Justice O'Connor, also involved compensation and reparations.

One involved a compulsory arbitration scheme; the other involved a hearing before the Commodity Futures Trading Commission. In both instances the money which was awarded went to private individuals, again, out of the pocket of one private individual into the pocket of another.

So it seems to me that the line between public rights and private rights—even though I take the view that S. 558 is a public rights statute, the line between the two has been blurred by the Supreme Court in the last two decisions. It is no longer constitutionally critical that the administrative enforcement procedure, in fact, result in a remedy which goes only to the government; that is, the remedy in the administrative proceeding can go to the private individual.

Senator Thurmond, that has been the scheme that Congress has created for many, many years. If you go back to the Interstate Commerce Act in 1887, that Act set up a scheme where the administrative agency could award reparations from one private individual to another.

So it seems to me that even though this is a public rights bill, that is not constitutionally determinative, as Justice O'Connor discussed in the two opinions the last two terms of Court.

Senator THURMOND. What makes a right a public right?

Mr. WOLF. Well, the best I can do on that, Senator Thurmond, is to quote Justice White's opinion in *Atlas Roofing*, and he purports to define it, and I will quote you, "cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact."

The best I can make out is simply that Congress enacts a statute giving the sovereign, the U.S. Government, the power to bring the action. If Congress purports to make it a private litigation—that is, private person X against private person Y—that is a private action.

But to the extent the government is a party to the lawsuit, it would seem to be the import of *Atlas Roofing* that that would make it a public rights case. The Court has not been any clearer than that, Senator Thurmond. I think we are all struggling to figure out what that means, but my reading would be that when the government sues in its sovereign capacity, it is a public rights case, and when a private individual sues, it is a private rights case.

Mr. ROWE. I think the Court would not include within the realm of public rights cases ones in which the rights existed under the Constitution or under State common law. But what we are talking

about here is the combination of the suit being brought by the government and the right being one created by Congress, both of which are true in this case.

So just to wrap up briefly, the premise of your question was that our position was that private rights could be adjudicated without a jury. That is not our position. Our position is that what the Supreme Court's cases have settled is that public rights can be tried without jury, and because this is a statutory right being enforced by the sovereign suing in its sovereign capacity, even though the remedy goes at least in part to a private party, it would be classified as a public right.

That would not be true, probably, if it were a constitutional right or if it were a common law right. Public right is a term of art and perhaps deceptive because of the nature of the label.

Senator THURMOND. Any other comments?

Mr. NAGEOTTE. Yes, Senator Thurmond, I have one. I have to totally and respectfully disagree with the professors on this point. In *Atlas Roofing*, the Supreme Court distinguished private rights and public rights and said, "Wholly private tort, contract and property cases, as well as a vast range of other cases, are not at all implicated."

What you have in S. 558 is totally property and contract law involved. It is the right of a person to contract with or without discrimination, if they desire. So you are dealing with contractual matters and property matters which are historically private rights.

You are dealing with the remedies, which are also important in the distinction, and compensatory damages and punitive damages, and now after *Tull*, civil penalties which are historically common law types of relief.

I just do not see how the professors can say that this is a public rights type of situation.

Mr. ROWE. Very easily because the distinction that it seems to me that Mr. Nageotte's comments overlook is it is one thing for a right created by statute, a public right, to affect people's ability to contract.

For that matter, for example, the administrative scheme for the NLRB approved in the *Jones & Laughlin Steel* case regulates the area of employment contracts between labor and management. Yet it is still regarded as a private right. The enforcement scheme approved in *Jones & Laughlin* permitted remedies to go to private parties, to the union, to the employees.

The kinds of references that the Court was making when it refers to tort, property and contract very much are private rights. That is when you are talking about tort claims, contract claims, property claims under common law or under State law.

But when you get Federal congressional regulation, the claims are claims under the statute and the enforcement of those when done by the sovereign is what the Supreme Court seems repeatedly to have said constitutes a public right.

Mr. NAGEOTTE. Let me just make one point on the *Jones*——

Senator SIMON. We will take your comment and we will discontinue the debate among the panelists and the Chair will take over.

Mr. NAGEOTTE. Be very cautious in looking at the *Jones & Laughlin* case. You see, the *Jones & Laughlin* case only involved

the limited issue of back pay which the Court equated to the equitable relief of restitution. So the seventh amendment right of trial by jury was not really involved in *Jones & Laughlin* and, really, that case went off more on equitable rights and remedies as opposed to legal rights and remedies.

Mr. KAMENAR. I would like just to finally add, since I have not been involved in this debate here, again, we are talking about a tort action in the same way as Justice Marshall said in *Curtis* v. *Loether.*

When he looked at the nature of title VIII, which is what we are talking about today, that the nature of the action deals with one that, at common law, dealt with tort in terms of not renting to somebody because of their race, et cetera—it is a tort; it is a tort against the dignity of that individual, et cetera. These are grounded in those kinds of common law actions.

Curtis v. *Loether* clearly said, and unanimously, that just because the right did not exist in 1791 does not mean we cut it off there. You look at whether they are in the nature of common law actions that Congress could later on, as they did in title VIII and as the Court ruled in *Curtis* v. *Loether*—these are actions at law and a jury trial is required. *Curtis* v. *Loether* should still be applied in this case as well and it has not been refuted.

Mr. ROWE. You are absolutely right with respect to trials in court. The Court has never carried it over to administrative proceedings.

Senator SIMON. Professor Rowe, the Chair is going to take over, if Senator Thurmond does not have any further questions.

Senator THURMOND. I had another question, Mr. Chairman.

Senator SIMON. You have your other question and then the Chair wants to just ask one question.

Senator THURMOND. Is there any precedent for a scheme which includes, as does S. 558, all of the following: an administrative law judge can impose monetary damages without a de novo review; second, no agency review of the administrative law judge decision; third, circuit courts of appeals enforce the administrative law judge order?

Mr. WOLF. If I may respond——

Senator THURMOND. I ask if there is any precedent for a scheme of that kind. Do you know of any precedent?

Mr. WOLF. First, there is de novo review under S. 558 for questions of law. The court of appeals would have authority to review de novo all questions of law, including any questions of constitutionality that the respondent might raise.

There is no de novo review on questions of fact. Questions of fact are reviewed under the substantial evidence test. That, Senator Thurmond, is the common scheme in the United States Code.

Cases involving the National Labor Relations Board, the Federal Communications Commission, and any number of administrative agencies go from the agency to the court of appeals and are reviewed under both those standards, de novo review of law and review of facts on a substantial evidence test. That is a very common scheme, Senator Thurmond, and it is in many, many places in the United States Code.

With regard to the administrative law judge, whether the administrative judge is the final step in the administrative scheme varies from agency to agency. Sometimes the administrative law judge is, in fact, the final administrative determination for the factual matters. Other times, there is administrative review. That follows no particular pattern among the many, many statutes in the United States Code that provide similar schemes as S. 558 does.

Senator THURMOND. Any comments from the other side?

Mr. NAGEOTTE. Senator, I would just like to reiterate that is exactly true. There is no de novo review of the factfinder's findings of fact, and that just reaches an incredible situation at the appellate court levels. It is very, very bad policy, I believe.

Mr. KAMENAR. Senator Thurmond, I also do not know of any precedent for an enforcement mechanism that has all these three or four characteristics, as you have stated. There may be some of those in some agencies, some in the others, but to have all these in one enforcement mechanism without the right to jury trial or de novo review and having the ALJ not be reviewed by its own agency, I think is unprecedented.

Senator THURMOND. Mr. Chairman, I have finished all except one question. Would you want me to ask that or wait?

Senator SIMON. You keep getting one more question here, Senator Thurmond. Go ahead.

Senator THURMOND. Well, I do not want to impose on you.

Senator SIMON. Go ahead.

Senator THURMOND. I would like to ask you, and you can answer this with one word—I know you lawyers like to talk, but you can answer this with one word. I am a lawyer, too.

Do you believe the Congress can transfer any cause of action currently decided in the courts to an administrative proceeding, yes or no, either Professor Wolf or Professor Rowe?

Mr. ROWE. With respect to some of the private rights and constitutional——

Senator THURMOND. I am not asking you to comment on it. I asked you to answer in one word. I will repeat the question. Do you believe that Congress can transfer any cause of action currently decided in the courts to an administrative proceeding?

Mr. WOLF. I would say no.

Mr. ROWE. No.

Senator THURMOND. The answer is no. Then what limitations do apply?

Mr. ROWE. The private rights/public rights distinction that we have been talking about.

Mr. WOLF. I would offer that one, and I also think that you have to combine the answer with other safeguards. For example, if the question is whether Congress could transfer these rights, Senator Thurmond, to an administrative agency for final determination, I think that is a different question than whether they can transfer those rights for an initial determination.

It seems to me that when you talk about these questions, you cannot just look at the determination initially in the administrative proceeding. You have got to look at what comes down the road.

The Supreme Court has indicated that so long as there is review in an article III court at some point with the legal questions being

reviewed de novo and the factual questions by a substantial evidence test, that that is constitutionally sufficient.

So it seems to me that you have to look at the total scheme, not simply whether the initial adjudication is before an administrative law judge or a commission composed of several members.

You have got to see what the review procedures are and whether the person or persons affected by the administrative order do have a right to go to an article III court at some point during the proceeding. S. 558 certainly has all those procedural protections and, in my view, are constitutionally required protections of review in an article III court.

Senator THURMOND. Mr. Chairman, that is all we have now. We may have some follow-up questions.

Senator SIMON. Thank you.

I will have a series of questions I will submit to you. We will appreciate having answers for the record.

Senator SIMON. If I may ask this one question, Mr. Kamenar and Mr. Nageotte, we have a major problem of discrimination in this country. I do not think anyone denies that. What we want to is to see if there is a way to speed up this process so we can provide justice and opportunity for people.

How would you construct speedy movement so we can move in that direction?

Mr. KAMENAR. Well, Senator, like I said earlier in my opening statement, there are two other enforcement mechanisms in this bill. Apparently, the drafters of this bill thought those were also sufficient, and that is the aggrieved person can file suit in district court, as well as the fact that the Attorney General can file suit in district court if there is a violation of a conciliation agreement and other things, which I think helps speed up a resolution of the process.

I think one could argue that the time it takes for an ALJ to adjudicate many cases may indeed be longer than if you had gone straight into a district court where you can adjudicate these claims.

As I said earlier, if the facts are clear, you can do it by summary judgment. You would not necessarily need a jury trial. What I do object to is, in our haste to solve a particular social problem, to try to take shortcuts around the Constitution.

I think that by having a jury trial, you are not going to experience the delay that many think would be present otherwise.

Senator SIMON. Mr. Nageotte.

Mr. NAGEOTTE. Senator Simon, I think that the saying is if it is not broken, do not try to fix it, and that is exactly what we have here. There is nothing broken in the system as it now stands.

If you look at *Curtis* v. *Loether*, that was a situation in which the person discriminated against actually came in and obtained a temporary injunction. The courts are always available on a moment's notice. You can get a TRO without even notice to the other side. You just go in and you say here is my problem, Judge; give me a 3-day injunction until I can get notice to the other side and bring them in and address the problem.

At that point, you get either the injunction continued on or perhaps dissolved if your position is not correct. So there is no problem with speed in the courts. There may be a problem with speed

in the ultimate resolution of the case at the jury trial level, but, you know, you have to decide what you want.

Do you want speed and problems and oppression and everything that our ancestors found came with doing away with or not having a right of trial by jury, or at that level when we are only talking about dollars as opposed to remedying the immediate situation, which is done by injunctive relief, can we sacrifice a little bit of speed and make sure that our constitutional protections are left in place?

That is what we are talking about, and I do not think that this approach, 558, solves it. You may have other problems, like backlogs in the court, but I submit to you those can be solved quicker, easier and less expensively than S. 558.

Senator SIMON. Comments by either Professor Wolf or Professor Rowe?

Mr. ROWE. I have no comment because the discussion there goes to the policy issues and I have tried to limit my comments to the legal issues.

Mr. WOLF. I share Senator Thurmond's earlier concern about the matter of transferring cases wholesale to administrative agencies. I started before articulating some of the criteria that the Supreme Court has explored.

One of those criteria is looking at the concerns which propels Congress to, in essence, give administrative agencies the authority to adjudicate the claims arising under, in this case, title VIII.

That is one of the factors that Justice O'Connor articulated in the *Schor* case and the *Thomas* case. The Court prior to those cases also talked about the concerns that drove Congress to depart from the requirement of article III.

It seems to me that when you are evaluating S. 558, the subcommittee has already and should continue to address the question of why are we doing this. The subcommittee may conclude that some of the reasons might be to provide a more expeditious hearing or to provide a cheaper hearing. For example, in an administrative process, it is a lot less expensive for the victim. The victim really does not have to put out attorney's fees, does not have to lay out expenses for depositions or any other number of costs that are required in the district court.

To the extent that it is a more efficient operation in the administrative proceeding, all those factors would address the Supreme Court's articulated criterion that we ought to evaluate, when we look at the constitutionality of matters like this, the reasons why Congress adopted the scheme it did.

It seems to me that those reasons, reasons such as efficiency, economy, speed, and the inexpensive nature of the administrative procedure, are all concerns that this subcommittee could very well conclude underlie S. 558, should it become public law.

Senator SIMON. We thank you.

[The following material was subsequently submitted for the record:]

WASHINGTON LEGAL FOUNDATION
1705 N STREET, N.W.
WASHINGTON, D.C. 20036
202-857-0240

June 18, 1987

Senator Paul Simon
Chairman, Subcommittee on the
Constitution of the Senate
Judiciary Committee
Washington, D.C. 20510

Dear Senator Simon:

This letter is in response to your two letters dated June 9 and June 17 requesting my responses to additional questions from committee members concerning S. 558. You requested my response by June 18. Inasmuch as I did not receive your June 9 letter until June 17, I was not afforded sufficient time to respond as fully as I would like. Nevertheless, I hereby provide you with the best responses I can give under the time constraints. I have repeated yours and your colleagues' questions verbatim with my response following each one.

QUESTIONS FROM SENATOR SIMON

Q1. In your testimony, you state that the Supreme Court's reasoning and holding in Tull v. U.S. would entitle a respondent in any such action to a jury trial notwithstanding the role of the ALJ and the Court of Appeals provided in S. 558. However, in a Washington Post article, dated April 29, 1987, you explained that the RULING WOULD NOT APPLY to government enforcement actions by an administrative tribunal. (See Washington Post article, 4/29/87)

Can you clarify your position on how, if at all, the Court's holding in U.S. v. Tull affects S. 558's administrative adjudication provision? Has your position changed?

How do you explain footnote 4 of the Tull opinion, which explicitly distinguishes administrative remedies provided by Congress, citing Atlas Roofing with approval? (See footnote 4, attached)

A1. In the first place, I did not state in the Washington Post article that the Tull "ruling would not apply" to government enforcement actions by an administrative tribunal. I was responding to a reporter's telephone inquiry on the day the decision was issued and, having not seen the decision yet, I necessarily had to rely on his characterization of the decision. I asked him whether the Court made reference to administrative law judges ("ALJs") or the Atlas case. The

reporter was confused or unclear about that issue, and consequently, I felt constrained to limit my remarks to the factual situation in Tull where there was no ALJ mechanism. Thus, my reported remarks stating that Tull affirms the right to a jury trial in such situations, while correct, does not necessarily mean that Tull can have no application even where there is an ALJ mechanism, as your question suggests. In other words, my remark was intended to mean that at least where there is no ALJ, Tull requires a jury trial.

Having subsequently read the Tull decision, it is my further view as I testified on June 9, that the language and reasoning of that case, as well as that in Curtis v. Loether, supports the proposition that the Seventh Amendment's protection to a right to jury trial would be required if a defendant was sued in court, both because of the nature of the action (action in debt; housing discrimination sounding in "tort") and the nature of the remedy (damages/civil penalities). Accordingly, my position on this issue has not "changed" as you suggest; rather, it simply has been clarified.

You also ask for my explanation of footnote 4 of the Tull opinion which references the Atlas Roofing decision. Footnote 4 states in full:

> The court has also considered the practical limitations of a jury trial and its functional compatibility with proceedings outside of traditional courts of law in holding that the Seventh Amendment is not applicable to administrative proceedings. See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 454 (1977); Pernell v. Southall Realty, supra, at 383. But the Court has not used these considerations as an independent basis for extending the right to a jury trial under the Seventh Amendment.

This dicta from the Tull decision does not contradict my position. The Court merely talks about the "functional compatibility" of juries "with proceedings outside" courts of law "in holding that the Seventh Amendment is not applicable to administrative proceedings." (Emphasis added). Taking this dicta at its face value and not reading other meaning into it, I would agree that juries cannot sit in an ALJ administrative proceeding, a forum which is outside the courts of law. Indeed, the Seventh Amendment speaks only to "suits at common law." Thus, there are two parts to the Seventh Amendment's operative phrase: (1) "suits", and (2) "at common law". Thus, I would

admit that an ALJ proceeding is not a "suit" regardless of whether the underlying nature or subject of the ALJ proceeding is equitable or at law. Accordingly, there is no right to a jury trial at the ALJ level in any case. Footnote 4 was placed in Tull following that part of the test which described what "at law" means, where the Tull court referred both to the "nature of the action and of the remedy sought." Thus, footnote 4 did not mean to undercut the Tull reasoning as to what is "at law"; it only referenced the Court's prior distinction between "suits" and "administrative proceedings," a distinction of forums only.

Interestingly, the Tull Court's dicta in footnote 4 to the Atlas Roofing is not to the holding of Atlas Roofing, but rather to page 454 of that decision which merely recites what the Court held in NLRB v. Jones & Laughlin Steel Corp and Pernell v. Southall Realty, 416 U.S. 368. In addition, I must assume that the Court's use of introductory signal "See" to support its dicta was intentional which indicates that the cited material (i.e., Atlas Roofing) does not directly support the dicta, but only follows from it. Rule 22, A Uniform System of Citation 8 (Harvard L. Rev., 14th ed.) (1986).

Accordingly, this watered-down dicta in a footnote is hardly a ringing endorsement for the proposition that Congress can strip away the constitutional right to a jury trial simply by having an ALJ proceeding. Rather, as I stated in my testimony, if a suit were to be filed in court seeking enforcement or recovery of monetary damages or civil penalities assessed by an ALJ, a jury trial would be required, for as the Tull Court emphasized, a "civil penalty [or money damages] was a type of remedy that could only be enforced in courts of law [as opposed to courts of equity]. 107 S.Ct. 1831, 1838 (1987) (Emphasis added). This is especially so, since even if one were to read the Atlas decision broadly, it applies only to public rights and not to the enforcement of private damages as provided under S. 558.

Q2. My colleagues and I have chosen to strengthen the enforcement remedies of Title VIII by authorizing administrative enforcement of housing discrimination cases, in order to expedite otherwise burdensome and costly litigation. When Congress has chosen to authorize administrative adjudication in the past, the Supreme Court has consistently upheld our power to do so. Your testimony, however, suggests that Congress should not have this power.

Can you offer any Supreme Court or lower federal court caselaw to support you position?

A2. The premise for your desire to have administrative enforcement of Title VIII presupposes that ALJ proceedings are quicker and less costly than court proceedings. I am not so sure that there has been an adequate demonstration of that proposition. Indeed, ALJ proceedings can be and are often lengthier than court proceedings. Furthermore, ALJ proceedings under S. 558 are subject to judicial review in the Court of Appeals, a review process that can take considerable time and expense. In addition, Section 810(a) allows an aggrieved person up to one year to file his or her claim alleging a housing discriminatory practice, and up to two years under Section 813 to file a suit in federal district court (not counting this time that an administrative proceeding was pending). It seems to me that if your goal is to encourage speedy action, these time periods are inconsistent with that. In employment discrimination case, for example, I believe that an aggrieved person must file his or her complaint with the Equal Employment Opportunity Commission within 30 days.

It is my understanding also that approximately 35 states have procedural mechanisms to review housing discrimination cases, and that conciliation agreements both at the state level as well as with HUD at the federal level is the usual or normal result. It seems to me that by having the ALJ procedure, an aggrieved party may be reluctant to conciliate knowing that under S. 558, an ALJ can award unlimited actual and punitive damages. In other words, if Congress' real concern is to enjoin discriminatory housing practices and provide remedial relief to the person to get them the housing they were wrongfully denied, this ALJ mechanism may actually encourage an aggrieved person to avoid conciliation and go for the prospect of getting large punitive damages.

The second part of your question states that "the Supreme Court has consistently upheld" Congress' power to authorize administrative adjudication" and you ask me for case authority showing the opposite. In the first place, you do not identify the Supreme Court cases you rely on. I will assume that you are relying on the same line of cases that Professors Rowe and Wolf relied on in their testimony. Those cases, as I have testified, are distinguishable from the issue at hand. For example, heavy reliance is placed on NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). Yet the relief in that case dealt with restitution and an award of back pay which are equitable remedies, not legal ones. Consequently, I would concede that no jury trial is required in that case. Similarly, in Crowell v. Benson, 285 U.S. 22 (1932), the compensation claim involved jurisdiction under maritime law and admiralty which were historically not "suits at common law" requiring a jury trial.

I have already explained my views of Atlas Roofing in my written and oral testimony. In sum, the Court has never been faced with the precise issue before the Committee, i.e., an ALJ awarding private damages, but the reasoning of the Tull and other decisions support the view that a jury trial is required if a suit is filed in such a case. I would also urge members of the Committee to read Professor Kirst's excellent law review article and cases cited therein referred to in my testimony "Administrative Penalities and The Civil Jury: The Supreme Court's Assault On The Seventh Amendment," 126 Univ. of Pa. L. Rev. 1281 (1978). None of the witnesses before this Committee or before the corresponding House committee has criticized Professor Kirst's scholarly work, nor do I know of any law review article that directly answers or counters Professor Kirst's analysis. I think his scholarship and his conclusions are unassailable. Consequently, I do not think the Congress should join in on the assault of constitutional freedoms and protections.

QUESTIONS FROM SENATOR DECONCINI

Q1. Tull held that in the federal district court, the Seventh Amendment guarantees the right to a jury in determining liability under the Clean Water Act. In Curtis v. Loether, fair housing violations were found to be similar to common law tort actions, and parties were entitled to a jury trial in federal district court. Would setting these housing disputes before administrative law judges create a violation of the Seventh Amendment Right to a jury trial?

A1. Yes it would, to the extent that a respondent would not be afforded a jury trial when the government seeks to recover the damage award set by the ALJ in a court of law. I refer you also to my written and oral testimony as well as my response above to Senator Simon's questions.

Q2. Has the administrative law judge process been questioned in other agencies for failing to provide a jury trial?

A2. Yes. Atlas Roofing is the principal case, but the actual holding was only that a jury is not required at the ALJ proceeding.

Q3. Do you agree that the right to a jury trial was never intended to depend on the forum to which Congress has chosen to submit a dispute? Could Congress eliminate the right to a jury in civil cases?

A3. Yes, although the Seventh Amendment refers to jury trials in "suits at common law." The traditional forum for a "suit" is a court of law. Thus, Congress, in my view, cannot by statute repeal the Seventh Amendment. Although an ALJ procedure may be used as an initial forum without a jury, any suit in court to recover damages is an action in debt entitling a person to a jury trial.

Q4. Judges have traditionally determined equitable relief, such as injunctions and restitution, without a right to a jury. Yet traditional common law areas require a right to a jury trial under the Seventh Amendment. Do you consider violations of this fair housing bill as matters in equity or as variations on traditional common law tort actions? Is this dispositive of whether there is a Seventh Amendment right to a jury?

A4. Money damages and civil penalities are legal and not equitable remedies. Furthermore, as Justice Marshall stated in Curtis v. Loether, the nature of a housing dispute is essentially a private tort action which is essentially a legal rather that equitable action. 415 U.S. 189, 195, n.10 (1974). There may be some equitable relief such as an injunction, but such relief cannot be used to deny a jury trial where there are legal claims as well, such as those for damages.

Q5. Does the fair housing law create a public right of action or does it create a right of private action against those who discriminate? Does the categorization of an action as public or private determine whether the parties have the right to demand a jury trial? How do you distinguish between a public and private right of action?

A5. Section 813 of S. 558 expressly creates a private right of action allowing an individual to sue in U.S. District Court. No one doubts that a jury trial would be required in that situation. The real question is whether the ALJ mechanism can foreclose a jury trial which we believe it cannot do. There may be come confusion with the concept of a "private right of action" and the concept of "public rights" versus "private rights" which Atlas Roofing referred to. In any event, our position is that S. 558 involves private rights since the right is for an "aggrieved person" who is injured by the discrimination. Damages, both compensatory and punitive, can be awarded to the private person rather than civil penalties going into the public treasury. It is our position that the Seventh Amendment right to jury trial does not depend on the artificial distinction between the public or private rights, but that if there is such a distinction, Title VII's remedies are in many respects private in nature. Public rights, as I testified, are

ones that benefit the public generally, such as consumer laws, anti-trust, environmental laws. Anti-discrimination laws seem by their very nature to be focused on the individual or private person being discriminated against.

Q6. Is the consent of the parties necessary for a federal magistrate to hear complaints of discrimination? Does the need for consent depend on whether the fair housing bill creates a public or private right of action?

A6. Under current law, and even under Section 813 of S. 558, if a person sues in district court, a magistrate can try the case only by consent of the parties. But if the underlying or unstated concern by this and other questions is how do we avoid a trial court with a jury, those concerns are greatly exaggerated and unjustified. The district court can and does resolve many disputes by summary judgment without a jury. The parties can waive their right to jury. The defendant is interested in a speedy and inexpensive resolution of his case as well as the plaintiff, and may utilize summary judgment procedures or waive his right to a jury trial. Thus, considering that most of these housing disputes are conciliated to begin with, and considering the summary judgment procedures that would likely be used in the remaining cases, the fears of lengthy jury trials in Title VIII cases is simply unwarranted. And even in those rare cases, courts can utilize other procedures to encourage settlements. In Strandell v. Jackson County, Illinois, No. 85-4159 (N.D. Il. April 17, 1987), for example, a federal district judge recently held an attorney from a prestigious law firm in criminal contempt of court for refusing to proceed to a non-binding Summary Jury Trial as recommended by the Judicial Conference and used by other courts, whereby a lengthy jury trial can be given a "dry run" before a jury in a day or two to encourage settlement. Courts have the resources to expedite cases. Congress can, of course, promulgate such rules of procedure generally or for Title VIII cases in particular to facilitate judicial resolution of disputes.

Q7. What is the effect of the Tull case on the use of magistrates to handle disputes between private parties?

A7. None. Parties can voluntarily agree to waive their rights, including a right to jury trial or right to an Article III judge. Indeed, they can waive their right altogether to a trial by agreeing to arbitration as the Supreme Court recently held in Shearson/American Express, Inc. v. McMahon, 55 LW 4757 (June 9, 1987).

QUESTION FROM SENATOR METZENBAUM

Q1. Mr. Kamenar, you have stated that the ALJ process included in S. 558 is unconstitutional. Does acceptance of this assertion mean that the constitutional legitamacy [sic] of other existing ALJ enforcement schemes must also be questioned? Please list all the ALJ enforcement schemes which would be jeopardized if your views are accepted.

A1. The ALJ process in S. 558 is unconstitutional to the extent that a jury trial is foreclosed for "suits at common law." To my knowledge, no other ALJ scheme has all the features of this one which permits the ALJ to award punitive damages for private injuries, is not reviewable by the agency, and is not subject to de novo review.

QUESTIONS FROM SENATOR HATCH

Q1. If S. 558 authorized initial fact-finding in administrative tribunals with ultimate assessment of damages, fines, and penalities subject to de novo district court review, would the 7th Amendment right be preserved?

A1. The Tull decision ruled that a jury trial is required only for liability and not for the assessment of fines. I agree with Justices Stevens and Scalia's dissenting opinion that juries are required for that function as well. Fact finding is clearly a jury function, and although an ALJ can initially find facts, an individual must be allowed under the 7th Amendment to try them de novo before a jury. My guess is, however, that most of the facts found by the ALJ can be stipulated by parties or be amenable to summary judgment, thus obviating the need for a jury.

Q2. Atlas seemed to say that any "public right" may be handled solely by ALJs. Is a fair housing action for an aggrieved party's damages a "public" or "private" right?

A2. As I stated earlier, I believe it is more in the nature of a private or individual right.

Q3. In your testimony you discuss "private" versus "public" rights. When the fair housing provisions of the Civil Rights laws were first enacted, Congress decided that the right of action was private in nature and enforceable in the courts, where a right to jury trial was upheld. In your view, can Congress change this "private right" into a "public right" by assigning it to ALJs? In other words, can Congress deprive a jury trial in any case by statute?

A3. No. Congress cannot transform a private right into a public right by merely committing its enforcement to an ALJ. Otherwise, Congress could "repeal" the Seventh Amendment by simple legislation.

Q4. Under S. 558, an ALJ would be empowered to award compensatory and punitive damages, with no agency review, and with no district court review or ultimate enforcement of the order. Are these common powers of ALJs or is this unprecedented authority?

A4. The powers of the ALJ in S. 558 appear to me to be unprecedented.

Q5. Doesn't this bill in effect provide for two equal forums for the purpose of fact-finding and initial adjudication with the only difference being that by following the ALJ procedure the right to a jury trial, as provided in Curtis v. Loether, is avoided?

A5. An aggrieved party is given an election of remedies or forum, i.e., either through an ALJ or district court. Yet the defendant's right to a jury trial is essentially left to the discretion of the aggrieved party, depending on what forum he happens to choose. A person's Seventh Amendment rights cannot be so waived.

Q6. Is there any appreciable difference between the powers granted to an ALJ under this bill and those powers currently exercised by the courts under the existing fair housing laws?

A6. None that I can see.

Q7. In Atlas, Justice White indicated that "wholly private tort, contract, and property cases, as well as a vast range of other cases are not at all implicated" in disputing the argument that "Congress could utterly destroy a jury trial by always providing for administrative rather than judicial resolution of the vast range of cases that now arise in the courts." Do you agree with his reasoning, or is it possible that Congress could render the 7th Amendment an empty shell?

A7. I agree with Justice White's statement but, as noted earlier, I disagree with the Atlas decision to the extent that it goes beyond its precise holding and is interpreted to mean that suits in law (i.e. for damages) do not allow jury trial for so-called "public rights." See my earlier response to Senator Simon's questions.

Thank you for the opportunity to testify and to assist this committee in its deliberations.

Sincerely yours,

Paul D. Kamenar
Executive Legal Director

NAGEOTTE & BORINSKY, P.C.
ATTORNEYS AT LAW
14908 JEFFERSON DAVIS HWY
WOODBRIDGE, VIRGINIA 22191-3997

(703) 491-4136
NO. VA. & D.C. Metro 690-3213
MD. Metro 643-2202

RICHARD R. NAGEOTTE
DANIEL P. BORINSKY
RONALD C. McCORMACK
JAMES S. KREIN

+ G. DAVID TYREE
(1943-1975)

June 18, 1987

The Honorable Paul Simon
United States Senate
SD-462 Dirksen Senate Office Building
Washington, DC 20510-6275

RE: Fair Housing Amendments Act of 1987 (S. 558)

Dear Senator Simon:

This letter responds to your letter of June 9, 1987 and the questions enclosed. I will answer the questions in the same order as contained in your letter. My answers are as follows.

Senator Simon's questions:

1. In the brief for petitioner in U.S. v. Tull I stated:

> Congress is free in any case involving public rights to vest fact-finding and initial adjudicatory responsibilities in an administrative agency, with no right to jury trial.

Have I changed my position with respect to Congress' power to authorize administrative enforcement?

ANSWER: No, I have not changed my position. It is important to understand the distinction between enforcement of "public rights" and "private rights". In my opinion, S. 558 provides for "private rights" not "public rights" to be the subject of administrative enforcement. It is important to remember, as I have pointed out in my prior correspondence to you, that Atlas Roofing stood for the limited proposition that Congress may authorize administrative enforcement of civil penalties in a "public rights" action without the restrictions of the Seventh Amendment. However, the administrative enforcement procedures of S. 558 provide for the imposition of compensatory and punitive damages to be awarded to the victim of discrimination in addition to the civil and criminal penalties provided in the act. Accordingly, S. 558 authorizes the enforcement of a "private right of action" in an administrative agency which goes beyond the limited principle established in Atlas Roofing. However, irrespective of the fact that Congress may provide for administrative enforcement in purely public rights cases without a requirement for a trial by jury under the Seventh Amendment, I would hope that Congress would not do so. I believe that the

Seventh Amendment is such a fundamental right and of such importance to the liberty of the citizens of this nation that Congress would use legislative restraint and not circumvent the Seventh Amendment, even in cases which are clearly public rights cases and accordingly would fall within the Atlas Roofing guidelines. In my experience the collective wisdom of a civil jury is far superior to the wisdom of one federal judge and even much more superior than that of an administrative law judge, who is after all a paid employee of the agency seeking enforcement. A fair trial is rarely obtained within the administrative enforcement proceedings of the agency which is charged with promulgating the rules and regulations under a statute and also acts as prosecutor, judge, and jury.

2. Supreme Court or lower federal court case law to support my claim that Congress should not use administrative enforcement to circumvent the right to jury trial.

ANSWER: I can not provide Supreme Court or lower federal court case law for my argument in favor of legislative restraint. Under Atlas Roofing, the Supreme Court has spoken and whether we agree or disagree in purely public rights cases, Congress may provide for administrative enforcement without regard to the Seventh Amendment's protection. Any lower federal court case law to the contrary is no longer binding as a result of the Supreme Court's decision in Atlas Roofing. I would, however, continue to press for legislative restraint and suggest a review of the history of the Seventh Amendment. The importance of the right of trial by jury is readily apparent by reviewing the history of Magna Carta, The Declaration of Independence, and the Federalist by Alexander Hamilton.

Senator DeConcini's questions:

1. Tull held that in federal district court, the Seventh Amendment guarantees the right to a jury in determining liability under the Clean Water Act. In Curtis v. Loether, Fair Housing Violations were found to be similar to common law tort actions, and parties were entitled to a jury trial in federal district court. Would setting these housing disputes before administrative law judges create a violation of the Seventh Amendment right to a jury trial?

ANSWER: In my opinion, the settling of housing disputes before an administrative law judge when the settlement involves a "private right of action" with traditional private relief, i.e., compensatory damages and punitive damages, would violate the Seventh Amendment's right to a jury trial. It is important to remember that under Atlas Roofing the distinction for determining whether or not the matter can be adjudicated within the agency without violating the Seventh Amendment depends upon whether it is a "public right of action" or "private right of action". As I read S. 558 it creates enforcement of a "private right of action" in the agency and would therefore violate the guidelines established in Atlas Roofing and violate the Seventh Amendment right to a jury trial. This

position is confirmed by Curtis v. Loether and the Supreme Court's observation that the cause of action and relief contemplated by S. 558 is similar to a common law tort action.

2. Has the administrative law judge process been questioned in other agencies for failing to provide a jury trial?

ANSWER: I have not specifically researched this question. However, I researched nearly everything relating to the Seventh Amendment in preparation for brief writing and oral argument in the Tull case. During this research I did not find any cases in this area except for Atlas Roofing. To my knowledge, Atlas Roofing was the first time that the Seventh Amendment issue was raised in an administrative enforcement proceeding. I would point out that many of the administrative enforcement proceedings of the past did not involve substantial amounts of money and this may be why there is very little case law. However, with the increasing number of cases and amounts involved in administrative enforcement proceedings, i.e., recent airline fines, recent Clean Water Act fines, etc., it is likely that agency action not previously thought to be worth challenging will be challenged in the future. Also, I am unaware of any other federal statute which seeks to place what have always been thought to be "private rights", i.e., a housing discrimination seeking compensatory and punitive damages under the umbrella of agency enforcement. It is very likely that a number of cases have not been appealed because they were clearly "public rights" cases and therefore fell under the Atlas Roofing guidelines. I feel certain that if S. 558 is passed that constitutional challenges will result from placing "private rights" within agency enforcement circumventing the Seventh Amendment right of trial by jury and violating the Atlas Roofing guidelines.

3. Do you agree that the right to a jury trial was never intended to depend on the forum to which Congress has chosen to submit a dispute? Could Congress eliminate the right to a jury in civil cases?

ANSWER: I personally agree and my historical research of the Seventh Amendment supports my belief that the right to jury trial was never intended to depend on the forum to which Congress has chosen to submit a dispute. However, I hasten to add that the Supreme Court of the United States obviously disagrees with my personal opinion as a result of its decision in Atlas Roofing. I find no rational justification to permit Congress to circumvent the Seventh Amendment irrespective of the forum that it uses to do so. I suggest that the Atlas Roofing decision was motivated by the Supreme Court's concern over the crowded condition of the federal courts. It may have been more of a administration of justice decision than an attempt to purely and rationally interrupt the constitutional issue raised by the Seventh Amendment. For whatever reason the Supreme Court ruled as it did in Atlas Roofing, it is clear that the decision has limited applicability. In my opinion, Congress may not constitutionally eliminate the right to a jury in civil cases by simply transferring those cases to an administrative agency for enforcement. This is precisely what is occurring in S. 558 and it is

important to remember that it is the distinction between "public rights" and "private rights" which the Supreme Court used as a justification to permit circumvention of the jury trial right in Atlas Roofing. I have assumed for the purpose of answering this question that your use of the term "civil cases" applies to those cases recognized as "private rights of action" and not "public rights of action" in which only the public s general right is protected by the imposition of injunctive relief and civil penalty enforcement where the proceeds of enforcement do not find their way into the pocket of a private litigant.

4. Judges have traditionally determined equitable relief, such as injunctions and restitution, without a right to a jury. Yet traditional common law areas require a right to a jury trial under the Seventh Amendment. Do you consider violations of this fair housing bill as matters in equity or as variations on traditional common law tort actions? Is this dispositive of whether there is a Seventh Amendment right to a jury?

ANSWER: I concur with your observation that traditional equitable relief, such as injunctions and restitution, do not require a jury trial under the Seventh Amendment as they were equitable actions recognized as such at the time of the Amendment. However, when Congress mixes traditional equitable relief and traditional common law relief as it is proposing in S. 558, then the principles established in Tull v. United States which are simply a continuation of the Supreme Court's decisions in Beacon Theaters, Inc. v. Westover, 359 U.S. 500 (1959), Diary Queen v. Wood, 369 U.S. 469 (1962), and Ross v. Bernhard, 396 U.S. 531 (1970) apply. As pointed out in Tull when only equitable relief is sought the Seventh Amendment protections do not apply. However, when in addition to equitable relief, common law relief, i.e., compensatory and punitive damages are sought, the defendant has a right under the Seventh Amendment to have the jury try all issues of fact which are common to both the equitable and common law relief. This doctrine necessarily flows from the Federal Rules of Civil Procedures which eliminated the distinctions between equity and law practice and requires only the filing of a single Complaint. In my opinion, this is one of the reasons why the elimination of the procedural distinctions between law and equity pleading is a mistake. Under the common law forms of pleading this would not be a problem and a Complaint for equitable relief would be brought on the equity side of the court and a Complaint for common law relief would be brought on the law side of the court. Having removed the distinction and providing for a single Complaint, the Supreme Court's position that common issues of fact must be tried first to the jury is the only logical method by which the Seventh Amendment's protection is insured.

5. Does the fair housing law create a public right of action or does it create a right of private action against those who discriminate? Does the categorization of an action as public or private determine whether the parties have the right to demand a jury trial? How do you distinguish between a public and private right of action?

ANSWER: As pointed out above, in my opinion, the single most critical issue in deciding whether Congress can rely upon Atlas Roofing for enforcement in the administrative agency is whether it is a "public right of action case". In my opinion, the fair housing law creates a statutorily enforceable "private right of action" which does require trial by jury. As previously pointed out the central issue in deciding whether a statute creates a "public right of action" or a "private right of action", is whether or not the statute allows a private individual to bring suit and the nature of the relief provided. In the case of S. 558 it is clear that a private individual, who believes there has been an act of discrimination, is given a cause of action within the administrative agency and may seek compensatory and punitive damages which have historically been viewed as damages resulting from a "private right of action". It is for this precise reason that I believe the enforcement provisions of S. 558 are unconstitutional as violating the Seventh Amendment right of trial by jury and do not fall under the limited exception for purely "public rights of action" addressed in Atlas Roofing.

6. Is the consent of the parties necessary for a federal magistrate to hear complaints of discrimination? Does the need for consent depend on whether the fair housing bill creates a public or private right of action?

ANSWER: In the Federal District Courts the parties are always requested to consent to the magistrate hearing the case with a right of appeal to the Federal District Court. Assuming underlying subject matter jurisdiction the parties in any litigation can always consent to trial by a Magistrate and the parties can waive their right of trial by jury. Consent has nothing at all to do with whether the fair housing bill creates a "public right of action" or a "private right of action". In those cases in which a "private right of action" exists, the parties can under Rule 38 of the Federal Rules of Civil Procedure, waive their right of trial by jury. However, it is my reading of S. 558 that the party discriminated against has the option of choosing enforcement in the Administrative Agency or the Federal Court. S. 558 does not give that option to the defendant and in my opinion, that constitutes a violation of the Seventh Amendment.

7. What is the effect of the Tull case on the use of Magistrates to handle disputes between private parties?

ANSWER: I do not believe that the Tull case has any effect at all on the use of Magistrates to handle disputes between private parties. As pointed out above, the use of Magistrates in the Federal District Courts is a process which requires the consent of all parties. If any party withholds consent, then the case must be tried before the District Court judge where a jury can be demanded if otherwise applicable.

Unidentified Questioner

Mr. Nageotte, you have stated that the ALJ process included in S. 558 is unconstitutional. Does acceptance of this assertion mean that the constitutional legitimacy of other existing ALJ enforcement schemes must also be questioned? Please list all the ALJ enforcement schemes which would be jeopardized if your views are accepted.

ANSWER: Please remember that it is my position that the ALJ enforcement procedure set out in S. 558 is unconstitutional only because it exceeds the Supreme Court's limited ruling in Atlas Roofing that "public rights of action" can be the subject of administrative enforcement without violating the Seventh Amendment. In my opinion, S. 558 will provide for enforcement of "private rights of action" including the assessment of compensatory and punitive damages (forms of relief traditionally available under the common law) in the administrative enforcement scheme. I am not aware of any currently existing enforcement procedure that allows an Administrative Law Judge to hear a case brought by a private litigant and grant relief in the form of compensatory and punitive damages for the benefit of that private litigant. To my knowledge, all of the administrative enforcement proceedings currently existing under federal statutes provide for enforcement in the agency level to be limited to issuing orders of compliance, suspending licenses, granting or denying permits and other privileges granted by the government, and imposing civil penalties for payment to a public fund used to address the issues which are the subject of the statute or civil penalties to the general treasury. None of the statutes currently existing, of which I am aware, provide for the radical procedure set out in S. 558 to transfer from the courts to an administrative agency a private cause of action for discrimination and the assessment of compensatory and punitive damages which are traditionally common law forms of relief granted to private litigants. Accordingly, it does not necessarily follow that my statement that S. 558 is unconstitutional, means that the constitutional legitimacy of other existing ALJ enforcement schemes must also be questioned. The critical distinction remains whether the enforcement scheme seeks to enforce "public rights of action" or "private rights of action" in the administrative agency. To the extent that any existing administrative enforcement scheme provides for enforcement of "private rights of action" in the administrative agency, my answer is "yes" that the legitimacy of those should also be questioned.

Again, I thank you for the opportunity to comment on this subject. With over twenty years experience trying all types of cases to a civil jury, I cannot over emphasize to you the importance of the Seventh Amendment to the fundamental liberty of our citizens and the terribly unfair and tragic things that happen when it is withheld. The Seventh Amendment has its foundation in the Magna Carta signed by King John under threat of civil war. The right of trial by jury was a principal concern of the colonists. The liberty it ensured is specifically set out in the Declaration of Independence, which was followed by the Revolutionary War. Its importance again surfaced during the

Constitutional Convention and only after assurance of the Bill of Rights, and in particular, preservation of the right of trial by jury, was the Constitution ratified. It would seem that a protection of liberty so important as to bring citizens to the brink of civil war, to break with the Crown and precipitate the Revolutionary War, contains a message that our government should not forget. Given this history and its importance to the liberty of our citizens, I would hope that Congress would exercise restraint and not deny this fundamental liberty to our citizens even in those limited situations permitted under the guidelines of Atlas Roofing.

Please do not hesitate to contact me if I can be of further information or assistance to you. With kindest regards, I remain

Very cordially yours,

RICHARD R. NAGEOTTE

RRN/jkb

SENATOR PAUL SIMON

QUESTIONS FOR
PROFESSORS ARTHUR WOLF AND THOMAS ROWE

1) Your testimony provides a thorough legal analysis on the constitutional implications of the administrative enforcement mechanism contained in S. 558. You note that the Supreme Court has upheld Congress' power to delegate "judicial power" to administrative law judges without the constraints of the Seventh Amendment's right to jury trial.

In your opinion, is the Court's ruling in U.S. v. Tull consistent with its past decisions which upheld administrative enforcement over Seventh Amendment objections.

2) You state in your testimony that Atlas Roofing Co. v. OSHA upheld non-jury administrative adjudication of legal rights. As a Professor of civil procedure, federal courts and constitutional law, **has the Seventh Amendment ever been held to extend to federal administrative proceedings like the one proposed in S. 558?**

3) It is my understanding that the Supreme Court has given great deference to Congress when it creates rights and assigns their enforcement to non-Article III officers.

Is the nature of a claim for housing discrimination the type of right Congress has historically been empowered to create and assign?

Duke University
DURHAM
NORTH CAROLINA

SCHOOL OF LAW

Thursday 18 June 1987

POSTAL CODE 27706

Hon. Paul Simon, Chairman
Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Senator Simon:

I have just received today your letter dated nine days ago requesting that I answer ten or twelve written questions on S. 558 and have the answers in your office by the close of business yesterday. I am sorry to have to say that the number of questions has become burdensome enough that, with other commitments, I cannot answer them all or give answers that are as full as might be possible or desirable. I spent much of yesterday afternoon writing answers to the questions from Senators Thurmond and Hatch that you expressed to me; I gave those answers to my Dean, Paul Carrington, for delivery at the hearing scheduled today at which he was to appear, but between the close of business yesterday and the hearing time today the session was called off and he was unable to deliver my answers. I am, therefore, enclosing with this letter the answers that I wrote yesterday to the Thurmond and Hatch questions. I will give what answers I can to the remaining questions that arrived today, to the extent that I can do so on an impromptu basis without research.

Simon #1: Yes, Tull is fully consistent. The Court has been quite protective of jury trial rights in Article III court proceedings but has consistently allowed nonjury administrative adjudication of identical or similar rights.

Simon #2: No, I know of no applications of the Seventh Amendment jury trial right to administrative proceedings, either by requiring a jury in the administrative proceeding or by declaring the administrative adjudication invalid because of the impracticality of having a jury. I believe that the prepared statement of Dean Carrington addressed this question.

Simon #3: I believe Professor Wolf will be able to answer this question much better than I can.

DeConcini #1: No, because the Supreme Court has consistently upheld nonjury administrative adjudication of claims that would be triable by a jury if heard in an Article III court.

DeConcini #2: I'm not sure, but I know of no Supreme Court opinions that either hold such action unconstitutional or raise

serious ground for expecting that it would be held unconstitutional.

DeConcini #3: As for original intent, I have not studied the history and cannot express an opinion; I can speak only of the likely application of existing Supreme Court precedent. As for Congressional elimination of the right to a jury in civil cases, it absolutely cannot do that in trials at law in Article III courts. One may or may not like the further point that the Court has invariably refused to strike down nonjury administrative adjudication of matters that would be triable by a jury if before an Article III court, but one cannot escape the fact that that is what the Court has done.

DeConcini #4: The right to trial by jury in Article III courts depends in large part not upon the subject matter of a claim but upon the relief sought, so it is impossible to speak of a "violation" as being a matter in equity or common law. What is dispositive of the Seventh Amendment right to trial by jury is not the law-equity distinction alone but also the context--Article III court or administrative adjudication. Matters that would be triable by a jury before an Article III court have historically not required a jury trial when assigned to an administrative agency for initial hearing and determination.

DeConcini #5: See answers to Thurmond questions.

DeConcini ## 6 and 7: Not answered for lack of time and because I have not been aware that hearings before magistrates were an issue in connection with S. 558. Congress has, incidentally, provided for magistrates to hold some jury trials.

Unattributed question: First, as I understand Mr. Nageotte's position, he does not claim this aspect of S. 558 would be unconstitutional. His letter of May 28 conceded that "under the case of Atlas Roofing, the Supreme Court has allowed Congress to provide for enforcement of federal statutes including the imposition of civil penalties in the administrative branch of government without the right of trial by jury." I do not have time to compile a list of other enforcement schemes that would be held unconstitutional if S. 558 were struck down.

I hope these answers are helpful.

Sincerely yours,

Thomas D. Rowe, Jr.

Thomas D. Rowe, Jr.
Professor of Law

Duke University
DURHAM
NORTH CAROLINA

SCHOOL OF LAW

Wednesday 17 June 1987

POSTAL CODE 27706

Hon. Paul Simon, Chairman
Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Senator Simon:

The following is in response to the questions you sent me from Senators Thurmond and Hatch in connection with S. 558.

Senator Hatch's first question is, "How do you reconcile your endorsement of S. 558 with the Carter Justice Department's view that this is not one of the circumstances for which Congress may elect an administrative forum and that such an attempt would be unconstitutional?"

Answer: In the first place, I have taken no position on S. 558 except to testify concerning its likely constitutionality if reviewed by the Supreme Court. As for the Carter Administration Justice Department's view, I do not know whether the measure under consideration then was closely similar to S. 558 or the reasoning behind the position as represented in the question. All I can say is that I see no foundation in the cases for expecting any serious likelihood that the Supreme Court would hold S. 558 unconstitutional. As the Supreme Court stated in Atlas Roofing, "The Seventh Amendment is no bar to the creation of new rights or to their enforcement outside the regular courts of law." 430 U.S. at 461. I can see various grounds for questioning S. 558; one may disagree with the Supreme Court's interpretation of the Seventh Amendment, or believe that Congress should be more protective of this constitutional right than the Supreme Court has been, or conclude that the measure would represent bad policy (issues on which I take no position). But as for the likelihood of the measure's being unconstitutional in the predictive sense that the Supreme Court would strike it down, nothing I have heard so far has given me reason to take such suggestions seriously.

Senator Hatch's second question is, "How do you reconcile your position with Professor Walter Gellhorn's post-Atlas assessment that H.R. 3504, an earlier, similar version of this bill, would likely evoke a successful constitutional challenge due to 'too naked a transfer of power from the judiciary to the executive?'"

Answer: Professor Gellhorn's comment appears to go not to Seventh Amendment jury trial issues but to questions of separa-

tion of powers and the extent to which Congress can assign federal adjudicative authority to non-Article III federal tribunals. Strong Supreme Court majority opinions in this area in 1985 and 1986 have greatly reduced the likelihood of successful court challenges to such measures. Commodity Futures Trading Comm'n v. Schor, 106 S. Ct. 3245 (1986) (opinion by O'Connor, J., joined by seven of nine Justices); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985) (opinion by O'Connor, J., joined by five of nine Justices with all nine agreeing on judgment). I discussed Schor in my prepared statement at pp. 4-6 and have nothing to add here. To the extent that I understand Professor Gellhorn's argument from the brief quotation in the question, I doubt that he would take the same position after Thomas and Schor, at least on the question of what the Supreme Court would be likely to hold unconstitutional. Even before those cases, Professor Gellhorn's eminent colleague at Columbia, Professor Henry Monaghan, saw no Article III or Seventh Amendment obstacles to such enactments. Monaghan, Marbury and the Administrative State, 83 **Colum. L. Rev.** 1, 18 & n.105 (1983).

Senator Thurmond's questions are, "1. How do you distinguish private from public rights? 2. Can Congress, in essence, remove Constitutional restraints on private right cases by merely overlaying a 'new' statutory right over any such private right? If that is so, do any restraints apply to removal of cases to administrative proceedings? If not, what guidelines/standards restrain Congressional action?"

Answer: The Supreme Court's decisions on what constitutes a public versus a private right are not entirely clear, as the Court itself has conceded; what does seem to be clear is that the distinction itself is not dispositive, and that some "private" rights involving liability between one person to another can be subjected to at least initial adjudication by a federal administrative agency. The Thomas majority noted, without endorsing, prior articulations of the definition of "public rights" as involving "matters arising between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments," and "private rights" as involving "the liability of one individual to another under the law as defined." It continued: "The theory that the public rights/private rights dichotomy . . . provides a bright-line test for determining the requirements of Article III did not command a majority of the Court in Northern Pipeline. . . . [We cannot agree] that the right to an Article III forum is absolute unless the Federal Government is a party of record . . . ." 473 U.S. at 585-86.

Instead, "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III." Id. at 587. As for the extent of and limits on Congressional authority, Professor Monaghan notes that Crowell [v. Benson, 285 U.S. 22 (1932),] "sanctioned a wide area for the operation of public administration, removing article III as a

meaningful barrier to the use of administrative agencies to establish and enforce, at least initially, all the rights created by the administrative state." Monaghan, supra, 83 **Colum. L. Rev.** at 13 (footnote omitted). What Congress has done in the fair housing area is not to "overlay a 'new' statutory right over" some pre-existing private claim for relief but rather something expressly approved in Atlas Roofing--the "creation of new rights"; S. 558 would place part of their "enforcement outside the regular courts of law," to which "[t]he Seventh Amendment is no bar." 430 U.S. at 461.

The limits on Congressional authority in this field appear to come not from the Seventh Amendment but from Article III. I have discussed those limits and their application in my prepared testimony at pp. 4-6. Schor upheld initial agency adjudication of a state law counterclaim while noting that agency jurisdiction over the underlying private reparations claim, created by Act of Congress, was "of unquestioned constitutional validity." 106 S. Ct. at 3260. Whatever unclarity exists on the periphery about some types of claims such as those under state law in certain types of non-Article III tribunals, none appears to exist about such core matters as the Congressionally-established claims themselves, including those involving the liability of one individual to another as in Schor and under S. 558.

I hope these responses are useful in the Subcommittee's consideration of the bill. For convenience, I am enclosing a copy of my prepared statement, to which I refer in this letter.

Sincerely yours,

Thomas D. Rowe, Jr.

Thomas D. Rowe, Jr.
Professor of Law

Enclosure

cc: Hon. Strom Thurmond
Hon. Orrin Hatch

School of Law
Western New England College
SPRINGFIELD, MASSACHUSETTS 01119-2689
TELEPHONE (413) 782-3111

June 17, 1987

Senator Paul Simon
Chair, Senate Subcommittee on the Constitution
Room 524, Dirksen SOB
United States Senate
Washington, D.C. 20510

Dear Senator Simon:

Thank you for your letters of June 9 and 16, 1987, enclosing additional questions regarding the constitutionality of the administrative enforcement mechanism of S. 558. I am pleased to have the opportunity to respond to these further inquiries. I have attached my responses to each set of questions.

If I can be of any further assistance to you and the Subcommittee in the consideration of S. 558, please do not hesitate to contact me again.

Faithfully,

Arthur D. Wolf
Professor of Law

QUESTIONS FOR
PROFESSORS ARTHUR WOLF AND THOMAS ROWE

1) Your testimony provides a thorough legal analysis on the constitutional implications of the administrative enforcement mechanism contained in S. 558. You note that the Supreme Court has upheld Congress' power to delegate "judicial power" to administrative law judges without the constraints of the Seventh Amendment's right to jury trial.

In your opinion, is the Court's ruling in U.S. v. Tull consistent with its past decisions which upheld administrative enforcement over Seventh Amendment objections.

2) You state in your testimony that Atlas Roofing Co. v. OSHA upheld non-jury administrative adjudication of legal rights. As a Professor of civil procedure, federal courts and constitutional law, **has the Seventh Amendment ever been held to extend to federal administrative proceedings like the one proposed in S. 558?**

3) It is my understanding that the Supreme Court has given great deference to Congress when it creates rights and assigns their enforcement to non-Article III officers.

Is the nature of a claim for housing discrimination the type of right Congress has historically been empowered to create and assign?

RESPONSES OF PROFESSOR ARTHUR D. WOLF

Response to Question #1:

Yes. The ruling of the Supreme Court in Tull is perfectly consistent with its earlier decisions on the Seventh Amendment. The Court has interpreted the Amendment to require jury trials when Congress assigns the resolution of statutory claims to the United States district courts but not when Congress choses an administrative enforcement process. Curtis v. Loether, 415 U.S. 189 (1974). The line that the Supreme Court has drawn is bright and clearly illustrated by comparing the rulings in Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1977) and Tull v. United States, 55 U.S.L. Week 4571 (U.S. April 28, 1987). In both cases, the United States initiated enforcement proceedings against private parties to recover civil penalties for violating federal statutes enacted to regulate commerce. In both cases, the private parties demanded a jury trial under the Seventh Amendment. The Court upheld that demand in Tull and rejected it in Atlas Roofing. The only difference is that Tull was brought in the district court while Atlas Roofing was an administrative proceeding, a difference the Court expressly acknowledged in both decisions.

Response to Question #2:

No. My research has uncovered no decision in which the Supreme Court has extended the right of jury trial to an administrative proceeding. On the contrary, it has regularly held that jury trials and the administrative process are "incompatible." Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission, 430 U.S. 442, 450 (1977). The Court has also refused to apply the Seventh Amendment to the states through the incorporation theory of the 14th Amendment.

Response to Question #3:

Yes. The power of Congress to prohibit housing discrimination is rooted in the Commerce Clause and the post-Civil War Amendments. The Supreme Court has long recognized the constitutionality of "administrative agencies created for the determination" of claims established through "the exercise of the congressional power as to interstate and foreign commerce." Crowell v. Benson, 285 U.S. 22, 51 (1932). In this sense, claims of housing discrimination are no different from claims for workers compensation, for damages under commodity brokerage contracts, or for reimbursement under data-sharing programs. In each of these instances, the Supreme Court has permitted Congress to assign such claims to non-Article III forums.

Over 130 years ago, the Court acknowledged the broad scope of congressional discretion to assign such claims to courts or agencies. These "public rights" are matters which "are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272, 284 (1855). This is simply a recognition of the settled power of Congress over the jurisdiction of the federal courts, which includes the power to create claims and assign their resolution to an appropriate tribunal.

But congressional authority to assign statutory claims to non-Article III tribunals is not unlimited. Over the years, the Supreme Court has identified several factors which bear on the constitutionality of such assignment: (1) the degree to which the non-Article III forum exercises the "essential attributes" of judicial power; (2) the nature of the claims assigned; (3) the right and scope of judicial review in an Article III court; (4) the extent to which the non-Article III tribunal is limited to determining claims in "specialized area having particularized needs"; and (5) the reasons why Congress chose the non-Article III tribunal over the federal district court. S. 558 satisfies these criteria when measured against them. See Pages 16-18 of my statement to the Subcommittee on June 9, 1987.

QUESTIONS FOR PROFESSORS WOLF AND ROWE FROM SEN. METZENBAUM

MR. KAMENAR AND MR. NAGEOTTE HAVE STATED THAT THE ALJ PROCESS INCLUDED IN S. 558 IS UNCONSTITUTIONAL. DOES ACCEPTANCE OF THIS ASSERTION MEAN THAT THE CONSTITUTIONAL LEGITAMACY OF OTHER EXISTING ALJ ENFORCEMENT SCHEMES MUST ALSO BE QUESTIONED? PLEASE LIST ALL THE ALJ ENFORCEMENT SCHEMES WHICH WOULD BE JEOPARDIZED IF THE VIEWS OF MR. KAMENAR AND MR. NAGEOTTE ARE ACCEPTED.

RESPONSE OF PROFESSOR ARTHUR D. WOLF

Response to Question:

Yes. If the administrative enforcement mechanism of S. 558 is unconstitutional, then many other federal statutory schemes would have to be questioned. If the Supreme Court were to declare that plan invalid, it would cast doubt upon dozens of administrative processes which have heretofore been considered unassailable. It would mean that most if not all of the claims now filed with federal agencies would have to be filed in the United States district court. Considering that the Social Security Administration alone receives and processes millions of claims each year, the consequences of such a ruling would be staggering.

On the other hand, if the objection to the administrative enforcement scheme of S. 558 is based only on Seventh Amendment considerations, then one solution would be to require the administrative law judges to impanel juries whenever a party to the proceeding demands it. That consequence is no less staggering than the one posited in the prior paragragh. The costs in terms of delay, money, efficiency, and other matters would undermine the purposes of S. 558, which are to streamline, expedite, and economize on the processing of housing discrimination complaints. Congress could also require de novo review of ALJ decisions in the district court, with a right to a jury trial reserved to either party. See Meeker v. Lehigh Valley R.R., 236 U.S. 412 (1915). That scheme too would undermine the purposes of S. 558 and render the initial administrative proceeding totally useless.

SENATOR DENNIS DECONCINI
QUESTIONS FOR ARTHUR D. WOLF

1. Tull held that in Federal District Court, the seventh amendment guarantees the right to a jury in determining liability under the Clean Water Act. In Curits v. Loether, fair housing violations were found to be similar to common law tort actions, and parties were entitled to a jury trial in Federal District Court. Would setting these housing disputes before Administrative Law Judges create a violation on the seventh amendment right to a jury trial?
2. Has the Administrative Law Judge process been questioned in other agencies for failing to provide a jury trial?
3. Do you agree that the right to a jury trial was never intended to depend on the forum to which Congress has chosen to submit a dispute? Could Congress eliminate the right to a jury in civil cases?
4. Judges have traditionally determined equitable relief, such as injunctions and restitution, without a right to a jury. Yet traditional common law areas require a right to a jury trial under the seventh amendment. Do you consider violations of this Fair Housing bill as matters in equity or as variations on traditional common law tort actions? Is this dispositive of whether there is a seventh amendment right to a jury?
5. Does the Fair Housing law create a public right of action or does it create a right of private action against those who discriminate? Does the categorization of an action as public or private determine whether the parties have the right to demand a jury trial? How do you distinguish between a public and private right of action?
6. Is the consent of the parties necessary for a Federal Magistrate to hear complaints of discrimination? Does the need for consent depend on whether the Fair Housing bill creates a public or private right of action?
7. What is the effect of the Tull case on the use of Magistrates to handle disputes between private parties?

Senator Dennis DeConcini
Questions for Thomas Rowe

1. Tull held that in Federal District Court, the seventh amendment guarantees the right to a jury in determining liability under the Clean Water Act. In Curits v. Loether, fair housing violations were found to be similar to common law tort actions, and parties were entitled to a jury trial in Federal District Court. Would setting these housing disputes before Administrative Law Judges create a violation on the seventh amendment right to a jury trial?
2. Has the Administrative Law Judge process been questioned in other agencies for failing to provide a jury trial?
3. Do you agree that the right to a jury trial was never intended to depend on the forum to which Congress has chosen to submit a dispute? Could Congress eliminate the right to a jury in civil cases?
4. Judges have traditionally determined equitable relief, such as injunctions and restitution, without a right to a jury. Yet traditional common law areas require a right to a jury trial under the seventh amendment. Do you consider violations of this Fair Housing bill as matters in equity or as variations on traditional common law tort actions? Is this dispositive of whether there is a seventh amendment right to a jury?
5. Does the Fair Housing law create a public right of action or does it create a right of private action against those who discriminate? Does the categorization of an action as public or private determine whether the parties have the right to demand a jury trial? How do you distinguish between a public and private right of action?
6. Is the consent of the parties necessary for a Federal Magistrate to hear complaints of discrimination? Does the need for consent depend on whether the Fair Housing bill creates a public or private right of action?
7. What is the effect of the Tull case on the use of Magistrates to handle disputes between private parties?

RESPONSES OF PROFESSOR ARTHUR D. WOLF

Response to Question #1:

No. At least since 1855, the Supreme Court has sustained the broad scope of legislative discretion to assign statutory claims to courts or administrative agencies. These "public rights" are matters which "are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272, 284 (1855). In both Tull and Curtis, the Supreme Court expressly recognized "congressional power to entrust enforcement of statutory rights to an administrative process ... free from the strictures of the Seventh Amendment." Curtis, 415 U.S. at 195.

In Tull, the Court noted that it "has also considered the practical limitations of a jury trial and its functional compatability with proceedings outside of traditional courts of law in holding that the Seventh Amendment is not applicable to administrative proceedings." 55 U.S.L. Week at 4573 n. 4. To the same effect, the Court held in Curtis, 415 U.S. at 194 (footnote omitted), that "the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication."

Response to Question #2:

On rare occasion it has been questioned, but to no avail. For example, in Crowell v. Benson, 285 U.S 22 (1932), the Court upheld the constitutionality of an administrative proceeding for monetary relief before a single hearing officer (who would today be called an administrative law judge). Just last term, the Court sustained the validity of an adjudicatory process con-

ducted by an administrative law judge for the recovery of damages in commodity futures trading involving private parties. In Commodity Futures Trading Commission v. Schor, 106 S.Ct. 3245, 3260 (1986), the Court noted that the "reparations scheme itself is of unquestioned constitutional validity."

Response to Question #3:

(a) I do not agree that the congressional choice of forum is irrelevant. For example, assigning cases to equity or admiralty courts never required the convening of a jury. If a plaintiff sought damages for a breach of contract in the law courts, a jury was available. If the same litigant sought specific performance for the same breach in an equity court, no jury was available. Furthermore, the same Congress which submitted the Seventh Amendment for adoption to the states also established administrative schemes for processing certain claims without the right of trial by jury. In addition, Congress may leave the resolution of federal claims to state courts alone where the Seventh Amendment does not apply. On Page 12 of my full statement to the Subcommittee, I noted three categories of cases which Congress has left exclusively to the state courts for initial determination.

To the extent that the jury is a finder of facts, the Supreme Court has noted that its availability historically did turn to some degree on the tribunal chosen to hear the case:

> [I]t is apparent from the history of jury trial in civil matters that factfinding ... was never the exclusive province of the jury under either the English or American legal systems at the time of the adoption of the Seventh Amendment; and the question whether a fact would be found by a jury turned to a considerable degree on the nature of the forum in which a litigant found himself.

Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission,

430 U.S. 442, 458 (1977)(emphasis added). Indeed "many civil as well as criminal proceedings at common law were without a jury." Kohl v. United States, 91 U.S. 367, 376 (1876).

The drafters of the Seventh Amendment might well have intended the words "Suits at common law" to be taken literally. That is, the right to a jury trial would apply only in those actions where the claim for damages was judge-made in the tradition of the common law courts. Since the courts had created the claim, there would be no check on their authority in particular cases other than the jury. One should keep in mind that in the early days of the Republic, the jury could decide both questions of law and fact. In one of the few jury trials in the United States Supreme Court, Chief Justice Jay charged the jury that it had the right "to determine the law as well as the fact in controversy." Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 (1794). Thus the jury under the Seventh Amendment served as a check on judicial power and as the people's voice in the law-giving function.

In contrast, when Congress creates a claim by statute, civil actions based on such statutory rights are not literally "suits at common law" because the judges play no role in the creation of the claim. In such instances, the jury is not needed as a check on governmental power because the judges serve that function when statutory cases come before them. If, on the other hand, the jury is viewed as the people's representative to insure that just and meritorious claims are satisfied, then the jury is also not needed when Congress creates the claim because the elected representatives of the people have spoken.

RESPONSES OF PROFESSOR ARTHUR D. WOLF (cont.)

(b) Of course, Congress could not abolish jury trials in all civil cases simply by assigning them to an administrative agency. First, the precedents upholding congressional power to assign statutory cases involving "public rights" do not apply to claims arising directly under the Constitution. Whether Congress could give non-Article III courts jurisdiction over constitutional claims is an open question, and raises issues far more difficult than those raised by S. 558.

Second, congressional authority to assign statutory claims to non-Article III tribunals is not unlimited. Over the years, the Supreme Court has identified several factors which bear on the constitutionality of such assignment: (1) the degree to which the non-Article III forum exercises the "essential attributes" of judicial power; (2) the nature of the claims assigned; (3) the right and scope of judicial review in an Article III court; (4) the extent to which the non-Article III tribunal is limited to determining claims in "specialized area having particularized needs"; and (5) the reasons why Congress chose the non-Article III tribunal over the federal district court. S. 558 does not approach the limits of congressional power.

Response to Question #4:

(a) By its terms, the Seventh Amendment applies only to suits "at common law"; it has no application to actions seeking equitable relief or cases within the admiralty jurisdiction. See Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446-47 (1830). Thus to the extent the administrative law judge, under S. 558, enters a cease and desist order (the equivalent of an injunction), the respondent would not be entitled to a jury trial even if the case were adjudicated in the United States district court. Thus no Seventh Amendment question

arises in connection with the provision in S. 558 for cease and desist authority.

S. 558 also permits the administrative law judge to award money damages, the traditional remedy in suits "at common law" to which the right of jury trial extended. See Curtis v. Loether, 415 U.S. 189, 196 (1974). To be sure, this is not an unusual provision. Congress has, in many other statutes, authorized administrative agencies and officers to award monetary relief in the form of damages. When the question has arisen, the Supreme Court has upheld such power. See, e.g., Commodity Futures Trading Commission v. Schor, 106 S. Ct. 3245 (1986); Crowell v. Benson, 285 U.S 22 (1932). Writing for the Court in Schor, 106 S. Ct. at 3260, Justice O'Connor stated that the "reparations scheme itself is of unquestioned constitutional validity."

(b) Thus in the United States district court, the availability of a jury turns on whether the claim is legal or equitable in nature. However, at the administrative level, it does not matter whether the claim is characterized as legal or equitable. See, e.g., Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1977).

Response to Question #5:

(a) The Federal Fair Housing Act creates both public and private rights. To the extent a victim of housing discrimination sues a private party in the United States district court, the claim may be seen as the assertion of a private right. To the extent the United States initiates a proceeding before an administrative law judge, the claim may be viewed as a "public right" because "the Government sues in its sovereign capacity to enforce public

rights created by statutes within the power of Congress to enact." Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission, 430 U.S. 442, 450 (1977).

(b) Whether a claim is characterized as a public right or private right does not matter if the case is brought in the United States district court. Thus when the United States Government sought to collect civil penalties in the district court in the Tull case, the Supreme Court required a jury trial on the liability issue even though the action asserted "public rights." In contrast, when the Government sought to collect civil penalties in an administrative proceeding, the Court held the Seventh Amendment inapplicable. Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1977).

In Crowell and Atlas Roofing, the Court sought to draw a line between public and private rights to determine whether the scope of congressional power to assign statutory claims to administrative agencies for resolution without a jury. In Crowell, however, the Court upheld the assignment of even private rights to an administrative officer for disposition without a jury. The recent Schor case is to the same effect. Thus it is doubtful whether the distinction between public and private rights ever had any significance.

In recent cases, such as Commodity Futures Trading Commission v. Schor, 106 S. Ct. 3245 (1986) and Thomas v. Union Carbide Agricultural Products Co., 105 S. Ct. 3325 (1985), the Court has blurred the distinction so that it has very little meaning in contemporary constitutional interpretation. In my judgment, the inability of the Court to define, clearly and precisely, the line between public and private rights has caused the Court to abandon the

significance of the distinction. In addition the distinction never had any application to cases commenced in the district court, as the holding in Tull demonstrates. Thus its usefulness as an analytical tool was questionable.

(c) In view of my response to subpart (b), I find no need to distinguish between public and private rights. In my judgment, Seventh Amendment analysis should proceed along the lines I suggested in my response to Question #3.

Response to Question #6:

(a) Yes. As I understand current law, the consent of the parties is necessary for the magistrate to dispose finally of a discrimination case. The district judge may, however, refer pre-trial matters, such as discovery motions, to the magistrate for disposition without the consent of the parties.

(b) No. Under current law, the need for consent turns on the provisions of the Magistrate Act of 1980. In my judgment, the broad powers given to the magistrates by that Act, even with the consent of the parties, is of doubtful constitutional validity for the reasons set forth in the dissenting views (attached hereto) of Representatives Drinan and Kindness in House Report No. 95-1364 to accompany S. 1613, the Magistrate Act of 1978 .

Response to Question #7:

The Tull case does not appear to have any effect on the ability of magistrates "to handle disputes between private parties." Under current law, magistrates may impanel juries upon timely demand of one of the parties in appropriate cases. As my response to subpart (b) of Question #6 suggests, my objections to the use of magistrates in disposin civil cases generally goes far beyond the jury trial issue. Thus I would not support the assignment of housing discrimination cases to magistrates, in part, because of constitutional concerns and in part for policy reasons.

95TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 95-1364

MAGISTRATE ACT OF 1978

JULY 17, 1978.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. KASTENMEIER, from the Committee on the Judiciary, submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany S. 1613]

PURPOSE OF THE BILL

The purpose of the proposed legislation, as observed by the Senate in its report (No. 95-344), is to amend the current jurisdictional provisions for United States magistrates—section 636, title 28, United State Code, in civil cases and section 3401, title 18, United States Code, in misdemeanor cases—in order to further clarify and expand the jurisdiction of United States magistrates and improve access to the Federal courts for the American public. The bill provides case-dispositive jurisdiction for magistrates in civil cases where the parties to the litigation consent to the exercise of such power by the magistrate. The bill does not affect the existing power of magistrates in the civil or criminal pretrial area. Further, the bill provides for an expansion of the present power of magistrates to dispose of certain less serious criminal cases by including all Federal misdemeanors within that jurisdiction.

CIVIL ACTIONS

Magistrates presently have no explicit authorization to finally decide civil cases. The bill explicitly permits civil case dispositive jurisdiction, when the magistrate is specially designated by the district court, and thus codifies and replaces the experimental practice now being carried on in thirty-six districts under 28 U.S.C. §§ 636 (b)(2) and (b)(3). Additionally, a magistrate is allowed to conduct jury trials when requested by the parties. The bill makes clear that the knowing and voluntary consent of the parties is required before any civil action may be referred to a magistrate; no coercion will be tolerated.

DISSENTING VIEWS OF REPRESENTATIVES ROBERT F. DRINAN AND THOMAS N. KINDNESS TO S. 1613, THE MAGISTRATE ACT OF 1978

In 1968, Congress created the system of Federal magistrates, which this bill now seeks to expand, to replace the prior system of United States commissioners, who were part-time judicial assistants, many of whom did not have adequate legal training. The conversion to magistrates was an attempt to upgrade these judges' aides to improve the quality of Federal justice. To some degree that goal has been achieved.

With the quality of the magistrate system steadily improving, S. 1613, which strives to continue that advance, would appear unassailable. No one wishes to arrest progress when it is moving in the proper direction. If the premises of the magistrate system were rooted in the richest soil, we would join without reservation our colleagues on the committee in supporting this bill. Our quarrel with this measure is that it extends a system which should not be in existence at all. At a minimum, we should not expand it beyond its present contours.

During the hearings on this bill, the Legal Aid Bureau of Baltimore submitted testimony in opposition to S. 1613. It referred to the bill as "an unheralded watershed in the role of the magistrate and indeed in the whole role of the Federal judiciary in this country." That is not an overstatement. S. 1613 will work a fundamental change in the character, function, and structure of the magistrate system and the Federal courts. We should not be misled into believing that the bill does less than that.

When Judge Charles Metzner, the chairman of the Committee on the Administration of the Federal Magistrates System of the Judicial Conference, testified before this Committee, he frankly stated his preference for Article III, life-tenured judges over magistrates. Because the legislative branch, in the past, has not provided sufficient resources to the judiciary, the Judicial Conference has been compelled to advocate expansions of the magistrate system. "[T]he track record of the Congress," Judge Metzner noted, "is that the courts are not being furnished with the necessary help, by way of judges and supporting personnel." Thus out of sheer necessity, the Judicial Conference concluded that the magistrate system is the only solution Congress would approve to the ever-increasing problems of docket congestion. Judge Metzner agreed that magistrates would not be needed if Congress would provide more Article III judges.

Our opposition to this bill arises out of our fundamental disagreement with the perceived need for Federal magistrates. In our judgment, this measure should not be approved for two reasons: (1) this committee and the House recently passed two bills which directly affect the need for S. 1613: the bills to create additional judgeships and to abolish diversity jurisdiction; and (2) the questionable con-

stitutionality of a system which authorizes the exercise of Federal judicial power by officers who are not appointed by the President, with the advice and consent of the Senate, who do not have life tenure, and whose salaries are not protected from diminution. Each of these objections will be examined in turn.

First, it is incongruous for this House to pass this bill now when we have so recently taken two important steps to deal with congestion in the Federal courts. Last February, the House passed H.R. 7843 which created 145 new Federal judgeships, both at the trial and appellate level. A few weeks later we approved H.R. 9622, which abolished diversity jurisdiction so that citizens of different states could no longer bring their state law claims into the Federal courts. Both of these important and necessary measures passed the House on the suspension calendar by two-thirds majorities. The diversity bill will remove at least 20 percent of the civil cases from the Federal courts, and the judgeship bill will provide additional judicial personnel to adjudicate with dispatch the remaining cases.

These two measures, when they become public law, will dramatically affect the caseload in the Federal courts. Together they will significantly reduce the backlog of litigation. Because of the imprecision of current statistical methodology, the impact of these bills is not clear. It is certain, however, that they will significantly affect the congestion in the Federal courts. One must then ask why we need to expand the magistrate system at this time when these two previously passed bills may provide all the relief that is needed. In fact the American Judicature Society has urged the committee to postpone consideration of S. 1613 until we are able to measure precisely the impact of these two bills. To us that is a sensible approach. When the need for any measure is surrounded with so much uncertainty, we should be very reluctant to approve it. That is clearly the case with the Magistrate Act of 1978.

Furthermore, the passage of S. 1613 would be inconsistent with the action taken by this committee and the House in revising the bankruptcy law. On February 1, 1978, the House voted 262 to 146 to establish the Federal bankruptcy courts as Article III tribunals. We took that action in part because of the serious question whether Congress may validly confer upon the referee in bankruptcy all the authority contained in the revised statute. See House Report No. 95-595 at 23–39 (95th Cong., 1st sess.) (1977). After fully exploring those issues, the committee and the House determined to establish the bankruptcy court under Article III, giving its judges life-tenure and protection from salary reduction. The nontenured status of the existing referees was considered constitutionally inadequate to support the new grant of jurisdiction. The arguments which counseled against vesting greater powers in non-Article III bankruptcy referees should persuade us here not to expand the jurisdiction of the non-Article III magistrates.

Second, we question seriously the constitutionality of a system which authorizes inferior officers to exercise the full judicial power which the Constitution demands be exercised only by judges appointed according to the strict terms of Article III. We begin with the three indicia which have always been considered the constitutionally minimum requirements for judges exercising Federal judicial power under Article III of the Constitution: (1) appointment by the Presi-

dent, with the advice and consent of the Senate; (2) life tenure; and (3) compensation which cannot be diminished during the judge's term of office. Magistrates do not satisfy any of these requirements. They are appointed by the district judges, not by the President. They do not have life tenure; indeed they serve solely at the pleasure of the district judges and may be dismissed summarily by them. Finally their salaries are not protected from diminution, a requirement which some consider even more important than life tenure and presidential appointment. In The Federalist, No. 79, Alexander Hamilton noted: "In the general course of human nature, *a power over a man's subsistence amounts to a power over his will*" (emphasis in original). Just as the power to tax involves the power to destroy, the power to reduce salary involves the power to abolish judicial independence.

Of course, these serious constitutional difficulties are present in the existing magistrate system. But they are exacerbated by S. 1613 because the magistrates are, for the first time, clearly given the power to dispose of civil cases by entering judgment after trial, with or without a jury. Two years ago when the Supreme Court approved a district court order referring all social security cases to magistrates for preliminary review, Chief Justice Burger, for a unanimous court, emphasized that magistrates only make recommendations to Article III judges who retain the power to make the final decision. "The district judge is free to follow [the magistrate's recommendation] or wholly to ignore it, or, if he is not satisfied, he may conduct the review in whole or in part anew. The authority—and the responsibility—to make an informed, final determination, we emphasize, remains with the judge." *Mathews* v. *Weber*, 423 U.S. 261, 271 (1976).

Under this bill, the clear line between the functions of the magistrate and the functions of the district judge, underscored by Chief Justice Burger in *Weber*, is totally obliterated. Under S. 1613, the magistrate cannot be distinguished from an Article III, life-tenured judge. The magistrate will be presiding over trials in a black robe behind a bench in the courtroom used by the district judges. The magistrate will be empaneling juries, examining witnesses, making evidentiary rulings, finding facts, and entering judgments, just as the district judge does. From the standpoint of appearance, procedure, and function, an impartial observer will not be able to tell the difference between a magistrate and an Article III judge. The magistrate will, under S. 1613, look like a judge, act like a judge, and speak like a judge. Unfortunately, a magistrate is not a judge, at least not in an Article III sense. And that is the only sense in which we should ever address the question whether Congress should invest the full judicial power of the United States in any officer.

It should be remembered too that magistrates, under S. 1613, will, for the first time, have the power to invalidate any legislative or executive action which conflicts with the Constitution. This authority, which is at the heart of the system of checks and balances, has historically been assigned only to Article III, life-tenured judges. This great power, first articulated in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), would, under this bill, be exercised by inferior judicial officers who are not Article III judges. Lodging such awesome authority with the magistrates demeans each of the three great Departments of the Government. It demeans the legislative and execu-

tive branches because their solemn acts may be invalidated by a "judge" not subject to the check of presidential appointment and Senate confirmation. It demeans the judicial branch because an angry legislature may reduce the salaries of the offending magistrates and an irritated executive may refuse to enforce their judgments. In short the delicate balance upon which the decision in *Marbury* so tenuously rests is greatly disturbed by the new assignment of this great power to magistrates. Their power to invalidate acts of the Congress and the President is not likely to survive its first exercise.

The singular difference between proceedings before a magistrate and proceedings before an Article III judge is that, under this bill, the parties must consent to have their case tried before a magistrate. No such consent is needed when the case is assigned to an Article III judge. It is this element of consent which the Justice Department, among others, contends preserves the constitutionality of the bill. That prop is much too weak to bear the weight the proponents of this measure would place upon it.

The question whether a non-Article III judge may exercise Article III judicial power is essentially a question of jurisdiction. A challenge to that authority is ordinarily framed in jurisdictional terms. If such power is not properly conferred, it is customary to conclude that such judge or court lacks jurisdiction to determine the cause. Because the propriety of this measure involves a question of jurisdiction, we do not see that consent will cure the constitutional infirmity. It has never been thought that parties to a controversy may consent to have their case adjudicated before an improperly constituted tribunal. Indeed the jurisprudence in the Federal courts has always been to the contrary. We would be breaking new constitutional ground were we to allow the parties in litigation to consent to a jurisdiction which is improperly conferred. We do not believe Congress should create a judicial system of doubtful validity and then direct the litigants to cure the defects by consenting to its jurisdiction. Article III of the Constitution clearly states that Federal judicial power is to be lodged "in such inferior Courts *as the Congress* may from time to time ordain and establish" (emphasis added). It is the role of Congress, not the parties in litigation, to constitute properly the courts of the United States.

The weakness of the logic of those who argue that consent cures all may be seen when carried to its inevitable conclusion. Under the consent theory, Congress could abolish all inferior Federal courts (e.g., the district courts and the courts of appeals) and replace them with a greatly expanded magistrate system. Litigants who desired a Federal forum would then only have to consent to appear before the magistrate in order to have their cases adjudicated. If one did not like the Federal magistrate system, then one could sue in the State courts. We seriously doubt if the Constitution ever contemplated such a perversion of Article III. It is inconceivable that Congress could so easily escape the life-tenure and undiminished compensation strictures of Artcle III through the simple strategem of consent of the parties. The independence of the judiciary, which is premised on those two requirements, should not lightly be vacated by that tortured construction of the Great Charter.

We hesitate also to expand an aspect of the Federal judicial system which has provided so little opportunity for minorities and women to

participate as decision-makers. Of the more than 160 full-time magistrates, less than a handful is female or minority. This dismal record of equal employment opportunity, not covered by Title VII of the Civil Rights Act of 1964, should caution against an unrestrained growth in the magistrate system. While the Edwards amendment, which we supported, should alleviate some of the difficulties in this area, it will not totally eliminate the problem.

Finally we should note that supporters of this measure argue that expanding the magistrate system is little more than institutionalizing to a greater degree the use of masters, a well-known and long recognized feature of English practice. When Judge Metzner was asked "whether the masters were identical with the magistrates," he answered that "[t]o all intents and purposes they are." What these proponents overlook is that for many years the use of masters has been discouraged by rule in the Federal courts."

When the Federal Rules of Civil Procedure were promulgated in 1938, Rule 53 incorporated the existing practice: "A reference to a master shall be the exception and not the rule." In 1957 the Supreme Court reinforced the vitality and importance of that rule. In *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957), the Court affirmed a judgment of the Court of Appeals which disapproved the referral of an antitrust case to a master by the district judge. The Supreme Court characterized the referral as "an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation." *Id.* at 256. To the argument that masters are needed to solve docket overload problems, the Court responded that "congestion in itself is not such an exceptional circumstance as to warrant a reference to a master. If such were the test, present congestion would make references the rule rather than the exception." *Id.* at 259.

Advocates of S. 1613 have advanced the same argument in support of an expanded magistrate system. They too claim that heavy caseloads demand passage of this measure. We should reject those assertions in the same summary fashion as the Supreme Court did in *La Buy*, especially since we have already taken two major steps to eliminate case congestion through the judgeship and diversity bills. These corrective measures should be given sufficient time to work before we embark upon the uncharted path of an expanded system of Federal magistrates.

In conclusion, we do not believe present circumstances justify the need for this bill, particularly in light of the passage by the House of the diversity and judgeship bills which should solve much of the court congestion problem. At a minimum we should postpone final consideration of S. 1613 until we can study the impact of these other measures on the administration of justice in the Federal courts. Furthermore the bill raises serious constitutional issues in expanding the powers of Federal magistrates so that they, in effect, will have the functions and authority of Article III judges without satisfying the requirements of Article III for the exercise of the judicial power of the United States. Such a major change in the structure of the Federal courts should be undertaken only for the most compelling reasons and with due regard for the brooding constitutional questions raised by the bill. Because S. 1613 does not meet this test, we cast our votes against it.

ROBERT DRINAN.
TOM KINDNESS.

School of Law
Western New England College
SPRINGFIELD, MASSACHUSETTS 01119-2689
TELEPHONE (413) 782-3111

June 19, 1987

Senator Orrin G. Hatch
Suite 135, Russell SOB
United States Senate
Washington, D.C. 20510

Re: S. 558, Fair Housing Amendments Act of 1987

Dear Senator Hatch:

On June 9, 1987, I testified before your Subcommittee on the Constitution in support of the constitutionality of the administrative enforcement mechanism of S. 558. I regret you were unable to attend the hearing. In view of your longstanding interest in these matters, I had looked forward to meeting you and discussing the bill. I later learned that other Senate business unfortuntely prevented your attending the hearing.

On June 16, Senator Simon sent me two questions which you submitted for my examination and response regarding S. 558. On June 17, I forwarded my responses directly to Senator Simon. So that you will have my responses as soon as possible, I thought I better write to you also. Enclosed please find my responses to your questions.

You may wish to know that the enclosed response to your Question #2 is a bit longer than the one I sent to Senator Simon. When I wrote to him on June 17, I responded to your Question #2, in part, with a reference to my statement of June 9 to the Subcommittee. I thought you might like to have that part of my statement in front of you so I have added it for your convenience.

If I can be of any further assistance to you, please do not hesitate to inquire further.

Faithfully,

Arthur D. Wolf

Arthur D. Wolf
Professor of Law

ADW:app

RESPONSES OF PROFESSOR ARTHUR D. WOLF

Question #1: How do you reconcile your endorsement of S. 558 with the Carter Justice Department's view that this is not one of the circumstances for which Congress may elect an administrative forum and that such an attempt would be unconstitutional?

Response to Question #1:

I assume you are referring to the views expressed by Larry A. Hammond, deputy assistant attorney general, in his letter dated January 25, 1978, to Ruth T. Prokop, HUD general counsel, on the constitutionality of the administrative enforcement scheme of H.R. 3504 (the Edwards-Drinan bill). First, I am not certain that letter can be said to be the "Carter Justice Department's view" of H.R. 3504. I recall discussing the matter at that time with Frank Allen, an attorney in the Civil Rights Division. My recollection of the events surrounding the generation of that letter opinion is that the Civil Rights Division harbored a different view of the constitutional issues than that which appears in the Hammond letter. Not wanting to interfere in the processes of the Office of Legal Counsel, the course chosen was that, after HUD reviewed the letter, there would be further discussion about the constitutional questions among HUD, Justice, and White House lawyers.

Second, I do not read the Hammond letter as an unequivocal determination of constitutional infirmity. Mr. Hammond refers to the "rather inconclusive standard of reference" (Page 7) regarding the criteria to measure constitutionality, and characterizes his own conclusion as "equivocal" (Page 8).

Third, I would not read the applicable precedents as narrowly as Mr. Hammond did in his letter. Cases such as Block v. Hirsh, 256 U.S. 135 (1921), Crowell v. Benson, 285 U.S. 22 (1932), and Atlas Roofing Co., Inc. v. Occupa-

tional Safety and Health Review Commission, 430 U.S. 442 (1977), are susceptible to much broader readings. Indeed Mr. Hammond acknowledged that the Supreme Court itself has, for example, interpreted Block and other decisions more broadly than he did.

Fourth, Mr. Hammond's letter was written before the recent decisions of the Supreme Court in Thomas v. Union Carbide Agricultural Products Co., 105 S. Ct. 3325 (1985), Commodity Futures Trading Commission v. Schor, 106 S. Ct. 3245 (1986), and Tull v. United States, 107 S. Ct. 1831 (1987). Justice O'Connor's opinion for the Court in Schor and Justice Brennan's opinion for the Court in Tull are especially enlightening on the issues discussed in Mr. Hammond's letter. You undoubtedly know that the Chief Justice joined both of those opinions. In these recent decisions, much of the uncertainty that Mr. Hammond perceived in the earlier precedents is removed or sharply reduced. Reading these cases together, I conclude that the Court is not nearly as troubled today as it might once have been over the constitutional issues raised by Congress' assignment of statutory claims to administrative agencies.

Question #2: How do you reconcile your position with Professor Walter Gellhorn's post Atlas assessment that H.R. 3504, an earlier, similar version of this bill, would likely evoke a successful constitutional challenge due to "too naked a transfer of power from the judiciary to the executive?"

Response to Question #2:

When Professor Gellhorn offered his views, he, like Mr. Hammond, did not have the benefit, as we do, of the recent Supreme Court decisions in Thomas, Schor, and Tull. The administrative enforcement plan in S. 558 is very simi-

lar to the one upheld in Schor and much more modest than the alternative dispute resolution scheme validated in the Thomas case. In Thomas, the Court sustained a compulsory arbitration arrangement imposed by Congress to resolve private controversies over the level of compensation due the complainant under the Federal Insecticide, Fungicide, and Rodenticide Act. The Court upheld the constitutionality of that scheme even though: (1) the arbitrators did not have the protections of Article III judges; (2) the parties did not have any right to a jury trial; and (3) the statute allowed only a very limited judicial review of the arbitration decision. That plan, although constitutional, is a far cry from the modest proposal contained in S. 558.

To be sure, congressional authority to assign statutory claims to non-Article III tribunals is not unlimited. Over the years, the Supreme Court has identified several factors which bear on the constitutionality of such assignment: (1) the degree to which the non-Article III forum exercises the "essential attributes" of judicial power; (2) the nature of the claims assigned; (3) the right and scope of judicial review in an Article III court; (4) the extent to which the non-Article III tribunal is limited to determining claims in "specialized area having particularized needs"; and (5) the reasons why Congress chose the non-Article III tribunal over the federal district court.

The assignment of authority under S. 558 to an administrative law judge is not "too naked a transfer of power from the judiciary to the executive," as Professor Gellhorn suggests. First, it is not a transfer at all since the victim retains the right to commence a civil action in state or federal court without first filing a complaint with the administrative agency (HUD). Second, to the extent the administrative process shares jurisdiction with the

state and federal judiciaries, the Supreme Court has not entered any constitutional objection to such arrangements, as my earlier references to Thomas and Schor fully attest.

Third, a careful analysis of the five factors noted in the previous paragraph reveals that S. 558 does not even approach the constitutional limits of legislative power. On Pages 16-18 of my statement to the Subcommittee on June 9, 1987, I analyzed the five criteria as follows: First, the administrative law judge does not have all the "essential attributes" of judicial power, exercising only a limited kind of judicial authority. While such judges, under S. 558, could hear and determine cases under Title VIII, they could not enforce their own orders, could not hold persons in contempt, and could not determine constitutional questions. Their limited authority is a far cry from the broad power exercised by Article III courts.

Second, the claims involved in this bill are "public rights," although the Constitution does not limit the jurisdiction of administrative agencies to such claims. As noted earlier in this statement, Congress may assign even "private rights" to such agencies. Further the forum created here is clearly part of an executive department, although independent of its head. To require the administrative law judges to hold jury trials would be incompatible with their role and place in our scheme of constitutional government.

Third, under S. 558, the person found to have violated Title VIII has a right of review in an Article III court, the United States Court of Appeals. The appellate court may review de novo all legal questions, including constitutional issues. Questions of fact are governed by the "substantial evidence" test which is the usual, well known, and permissible standard of appellate re-

view for factual determinations by administrative agencies.

Fourth, the subject matter jurisdiction exercised by the administrative law judges is limited to questions arising under Title VIII. They cannot hear claims under related housing statutes, such as 42 U.S.C. § 1982, the various housing acts administered by the Department of Housing and Urban Development, or state law. This extremely limited jurisdiction contrasts sharply with the broad range and scope of the case-dispositive authority of Article III courts and the bankruptcy judges. Congress could well determine that housing discrimination disputes under Title VIII are "specialized areas having particularized needs and warranting distinctive treatment" through administrative resolution.

Finally, the reasons why Congress chose to assign the resolution of Title VIII cases to an administrative tribunal is an important factor in determining constitutionality. The Legislature might very well see the administrative process as more efficient, less expensive, and more expeditious than civil suits in the state or federal courts, whose dockets in many districts are nearly unmanageable. The Senate Judiciary Committee has for years sought ways to alleviate docket congestion in the federal courts, including the expansion of the magistrate system and limiting diversity jurisdiction. With case loads being what they are, Congress could well decide that the administrative process is one way of relieving the increased pressure on the courts as case filings mount. Such practical considerations of governance inform the judgment about constitutionality.

NAGEOTTE & BORINSKY, P.C.
ATTORNEYS AT LAW

June 17, 1987

Honorable Orrin G. Hatch
United States Senate
229 Hart Senate Building
Washington, D.C. 20510-6275

RE: Questions of Senator Orrin G. Hatch
addressed to Richard R. Nageotte

Dear Senator Hatch:

Below please find my response to your seven written questions regarding S. 558.

1. If S. 558 authorized initial fact-finding in administrative tribunals with ultimate assessment of damages, fines and penalties subject to de novo district court review, would the 7th Amendment right be preserved?

ANSWER: In my opinion, if S. 558 authorized initial fact-finding with the ultimate determination to be subject to de novo review by the district court, this would present a close question under the case of Atlas Roofing. However, it is my opinion that Atlas Roofing strictly limited initial fact-finding and ultimate assessment of damages in those cases involving only "public rights". As S. 558 is a bill authorizing private rights of action, I do not believe that de novo review by the district court would solve the limitations established for administrative review by the Supreme Court in Atlas Roofing. Secondly, I would point out that even if de novo review by the district court would resolve the problem, this would be a most inefficient and expensive way to address the issue. Why provide for two hearings at the initial trial level, thereby duplicating the time and expense necessary to resolve the issue. This would be a wasteful use of governmental resources and substantially increase the expenses of the litigants.

2. Atlas seemed to say that any "public right" may be handled solely by ALJs. Is a fair housing action for an aggrieved party's damages a "public" or "private" right?

ANSWER: As I have consistently pointed out, in my opinion the Fair Housing action for aggrieved party's damages as provided for in S. 558 is a "private right of action", not a "public right" under the Supreme Court's analysis in Atlas Roofing. The cause of action sounds in tort and/or contract and the relief provided, compensatory and punitive damages payable to the injured party is clearly private relief.

3. In your testimony you discuss "private" versus "public" rights. When the fair housing provisions of the Civil Rights laws were first enacted, Congress decided that the right of action was private in nature and enforceable in the courts, where a right to jury trial was upheld. In your view, can Congress change this "private right" into a "public right" by assigning it to ALJs? In other words, can Congress deprive a jury trial in any case by statute?

ANSWER: In my opinion, Congress cannot change a "private right of action" to a "public right" simply by assigning it to an administrative tribunal, irrespective of what Congress has previously called the right of action. In this instance, Congress' previous legislative pronouncement that the Fair Housing Act constitutes a "private right" would be strong evidence in any case brought before the Supreme Court that it was in fact recognized by Congress as a "private right" and that Congress' new expression of intent is nothing more than an attempt to circumvent the limitations of Atlas Roofing by now calling the same type of action a "public right". Irrespective of what Congress calls a cause of action and the relief provided, it is clear that the cause of action and relief provided under S. 558 is a "private right of action" and not a "public right".

4. Under S. 558, an ALJ would be empowered to award compensatory and punitive damages, with no agency review, and with not district court review or ultimate enforcement of the order. Are these common powers of ALJs or is this unprecedented authority?

ANSWER: In my opinion, providing for an award of compensatory and punitive damages under S. 558 to be assessed in an administrative proceeding is an unprecedented authority to provide for the enforcement of "private rights of action" in the administrative forum. As previously pointed out, it is my opinion that this violates the Supreme Court's limited ruling and guidelines established in Atlas Roofing.

5. Doesn't this bill in effect provide for two equal forums for the purpose of fact-finding and initial adjudication with the only difference being that by following ALJ procedure the right to a jury trial, as provided in Curtis v. Loether, is avoided?

ANSWER: In my opinion, this bill does not provide two equal forums for purposes of fact-finding and initial adjudication. As I read S. 558, it gives the person alleging discriminatory action the right to choose the forum with the alleged offender having no equal right of choice. It is important to remember that both the plaintiff and defendant are entitled upon their demand to a right of trial by jury unless this right is waived by both. See Federal Rules of Civil Procedure, Rule 38. S. 558 does not provide a choice to the defendant and, accordingly, I believe violates the 7th Amendment.

6. Is there any appreciable difference between the powers granted to an ALJ under this bill and those powers currently exercised by the courts under the existing fair housing laws?

ANSWER: Yes. It is my understanding of the existing fair housing laws that the "private right of action" is assigned to the courts. Under Curtis v. Loether, the Supreme Court specifically held that the right of jury trial must be preserved under the 7th Amendment and the District Court had no right to deny a trial by jury. Under S. 558, Congress would be assigning a "private right of action" to the administrative forum which is not permitted under the guidelines set out in Atlas Roofing.

7. In Atlas, Justice White indicated that "wholly private tort, contract, and property cases, as well as a vast range of other cases are not at all implicated" in disputing the argument that "Congress could utterly destroy a jury trial by always providing for administrative rather than judicial resolution of the vast range of cases that now arise in the courts." Do you agree with his reasoning, or is it possible that Congress could render the 7th Amendment an empty shell?

ANSWER: I agree with Justice White's reasoning and do not believe that Congress can constitutionally render the 7th Amendment an empty shell. As I have pointed out, during my testimony and in my answers to other members of the Subcommittee, the key issue is whether Congress is providing for enforcement of a "public right" or a "private right". As S. 558 clearly provides a "private right of action", i.e., one sounding in tort and/or contract, with damages in the form of compensatory and punitive damages, which have always been common law forms of relief, this is precisely the analysis that Justice White was making in Atlas Roofing. Under Atlas Roofing Congress is empowered only to submit to the administrative agencies cases involving solely "public rights" and is absolutely precluded from assigning to administrative agencies the enforcement of "private rights".

It is hoped that this information satisfactorily responds to your questions. Please do not hesitate to contact me if I can be of further information or assistance to you or the Committee. With kindest regards, I remain

Very cordially yours,

Richard R. Nageotte

RICHARD R. NAGEOTTE

RRN/pmb

cc: Honorable Paul Simon, United States Senate
Deborah Leavy, Subcommittee on the Constitution

SENATOR ORRIN G. HATCH
QUESTIONS FOR ARTHUR D. WOLF

1. How do you reconcile your endorsement of S. 558 with the Carter Justice Department's view that this is not one of the circumstances for which Congress may elect an administrative forum and that such an attempt would be unconstitutional?

2. How do you reconcile your position with Professor Walter Gellhorn's post Atlas statement that H.R. 3504, an earlier, similar version of this bill, would likely evoke a successful constitutional challenge due to "too naked a transfer of power from the judiciary to the executive?"

RESPONSES OF PROFESSOR ARTHUR D. WOLF

Response to Question #1:

I assume you are referring to the views expressed by Larry A. Hammond, deputy assistant attorney general, in his letter dated January 25, 1978, to Ruth T. Prokop, HUD general counsel, on the constitutionality of the administrative enforcement scheme of H.R. 3504 (the Edwards-Drinan bill). First, I am not certain that letter can be said to be the "Carter Justice Department's view" of H.R. 3504. I recall discussing the matter at that time with Frank Allen, an attorney in the Civil Rights Division. My recollection of the events surrounding the generation of that letter opinion is that the Civil Rights Division harbored a different view of the constitutional issues than that which appears in the Hammond letter. Not wanting to interfere in the processes of the Office of Legal Counsel, the course chosen was that, after HUD reviewed the letter, there would be further discussion about the constitutional questions among HUD, Justice, and White House lawyers.

Second, I do not read the Hammond letter as an unequivocal determination of constitutional infirmity. Mr. Hammond refers to the "rather inconclusive standard of reference" (Page 7) regarding the criteria to measure constitutionality, and characterizes his own conclusion as "equivocal" (Page 8).

Third, I would not read the applicable precedents as narrowly as Mr. Hammond did in his letter. Cases such as Block v. Hirsh, 256 U.S. 135 (1921), Crowell v. Benson, 285 U.S. 22 (1932), and Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1977), are susceptible to much broader readings. Indeed Mr. Hammond acknowledged that the Supreme Court itself has, for example, interpreted Block and other decisions more broadly than he did.

RESPONSES OF PROFESSOR ARTHUR G. WOLF (cont.)

Fourth, Mr. Hammond's letter was written before the recent decisions of the Supreme Court in Thomas v. Union Carbide Agricultural Products Co., 105 S. Ct. 3325 (1985), Commodity Futures Trading Commission v. Schor, 106 S. Ct. 3245 (1986), and Tull v. United States, 55 U.S.L. Week 4571 (U.S. April 28, 1987). Justice O'Connor's opinion for the Court in Schor and Justice Brennan's opinion for the Court in Tull are especially enlightening on the issues discussed in Mr. Hammond's letter. You undoubtedly know that the Chief Justice joined both of those opinions. In these recent decisions, much of the uncertainty that Mr. Hammond perceived in the earlier precedents is removed or sharply reduced. Reading these cases together, I conclude that the Court is not nearly as troubled today as it might once have been over the constitutional issues raised by Congress' assignment of statutory claims to administrative agencies.

Response to Question #2:

When Professor Gellhorn offered his views, he, like Mr. Hammond, did not have the benefit, as we do, of the recent Supreme Court decisions in Thomas, Schor, and Tull. The administrative enforcement plan in S. 558 is very similar to the one upheld in Schor and much more modest than the alternative dispute resolution scheme validated in the Thomas case. In Thomas, the Court sustained a compulsory arbitration arrangement imposed by Congress to resolve private controversies over the level of compensation due the complainant under the Federal Insecticide, Fungicide, and Rodenticide Act. The Court upheld the constitutionality of that scheme even though: (1) the arbitrators did not have the protections of Article III judges; (2) the parties did not have any right to a jury trial; and (3) the statute allowed only a very limited judicial review of the arbitration decision. That plan, although constitutional, is a

far cry from the modest proposal contained in S. 558.

To be sure, congressional authority to assign statutory claims to non-Article III tribunals is not unlimited. Over the years, the Supreme Court has identified several factors which bear on the constitutionality of such assignment: (1) the degree to which the non-Article III forum exercises the "essential attributes" of judicial power; (2) the nature of the claims assigned; (3) the right and scope of judicial review in an Article III court; (4) the extent to which the non-Article III tribunal is limited to determining claims in "specialized area having particularized needs"; and (5) the reasons why Congress chose the non-Article III tribunal over the federal district court.

The assignment of authority under S. 558 to an administrative law judge is not "too naked a transfer of power from the judiciary to the executive," as Professor Gellhorn suggests. First, it is not a transfer at all since the victim retains the right to commence a civil action in state or federal court without first filing a complaint with the administrative agency (HUD). Second, to the extent the administrative process shares jurisdiction with the state and federal judiciaries, the Supreme Court has not entered any constitutional objection to such arrangements, as my earlier references to Thomas and Schor fully attest. Third, a careful analysis of the five factors noted in the previous paragraph reveals that S. 558 does not even approach the constitutional limits of legislative power. You may wish to review Pages 16-18 of my statement to the Subcommittee on June 9, 1987, where I analyzed the five criteria.

Senator SIMON. Our hearing stands adjourned.
[Whereupon, at 11:40 a.m., the subcommittee was adjourned.]

FAIR HOUSING AMENDMENTS ACT OF 1987

WEDNESDAY, JULY 1, 1987

U. S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 2 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Edward M. Kennedy presiding.

Also present: Senators Specter, DeConcini, Thurmond, and Hatch.

Staff present: Deborah Leavy, chief counsel; Jeffrey Robinson, minority chief counsel; Cheryl G. Matcho, chief clerk; Margaret Morton, legislative fellow.

OPENING STATEMENT OF SENATOR EDWARD M. KENNEDY

Senator KENNEDY. We will come to order.

We have scheduled this hearing today to hear additional views regarding the constitutionality of the administrative enforcement procedure in S. 558, the fair housing amendments bill.

The Subcommittee on the Constitution previously held a hearing on the question on June 9, 1987, but the Justice Department was unable to present its views at that time, and after the Department was unable again to present its views at a hearing scheduled for June 18, the subcommittee canceled that hearing and proceeded to report S. 558 to the full committee, where it is now pending.

The Justice Department then informed the committee that it was prepared to offer testimony on the constitutional question. We agreed to schedule this hearing so the Department could offer its views, with the understanding that the bill remains on the full committee's agenda.

I would hope that with today's hearings, we can finally put to rest any suggestion that there is any constitutional infirmity in the administrative enforcement procedure in the Kennedy-Specter bill.

The Supreme Court's precedents are clear. The seventh amendment does not prevent Congress from establishing administrative tribunals to hear enforcement actions brought by the government under federal statutes.

In my view, those who would point to the Supreme Court's recent decision in the *Tull* case as support for the contrary view are mistaken. The *Tull* court clearly and unambiguously reaffirmed the well-established rule that, and I quote, "The seventh amendment is not applicable to administrative proceedings."

The *Tull* decision thus supports the constitutionality of the enforcement mechanism in the Kennedy-Specter bill, and those within the administration who genuinely support the effort to strengthen the fair housing bill have acknowledged as much.

In a letter I placed in the record at the previous hearing on this issue, HUD's general counsel indicated in his view that the *Tull* decision supports the constitutionality of the administrative procedure in the Kennedy-Specter bill.

Today, the Justice Department's views will be presented by Mr. William Bradford Reynolds, Assistant Attorney General in charge of Civil Rights at the Department of Justice. We will hear from Mr. Reynolds, and then Prof. Geoffrey Hazard, Sterling Professor of Law at Yale Law School. We welcome both witnesses.

At this point we would like to insert in the record the prepared statements of Senator Thurmond and Senator Hatch.

[Prepared statements follow:]

PREPARED STATEMENT OF SENATOR STROM THURMOND

Mr. Chairman: I am pleased that the subcommittee is continuing its hearing into the seventh amendment and article III problems raised by S. 558. I feel it is important to have the administration comment on these important issues.

Mr. Reynolds, welcome to the committee. Since you are here largely at my request, I want to correct a misperception about your appearance here. Clearly, you have not delayed your appearance with us. While you could not be with us earlier, the record should reflect that you personally were prepared to be with us on earlier occasions. In fact, it is my understanding your testimony was ready 48 hours in advance of your scheduled appearance on June 18. While some in the administration may have been slow in reviewing that testimony, it would be incorrect and unfair to say you caused any delay. Your absence on June 18 was caused by forces outside of your control.

I want to state publicly and for the record that the Washington Post article of June 19, which implied that somehow you might be involved in a "guerrilla war" against this bill, was simply incorrect. I also note that you are the only witness I can ever recall whose testimony was actually presented to the committee 48 hours in advance.

We are glad you are with us, and look forward to your testimony.

PREPARED STATEMENT OF SENATOR ORRIN G. HATCH

Mr. Chairman, I would like to thank you for making the effort to schedule this important hearing on the constitutional issues posed by S. 558, the Fair Housing Amendments Act of 1987. I remember distinctly having regrets that the major constitutional issues of the Gramm-Rudman bill were never the subject of careful hearings.

S. 558 and the administration's proposal to expedite fair housing cases both pose issues with respect to the seventh amendment. The seventh amendment provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ." It is safe to say that preservation of jury trial rights was one of the major objections to the new Constitution in 1787. If the seventh amendment had not been part of the bill of rights, the Constitution itself might have become too controversial to survive. In the words of the Supreme Court, "the thrust of the Amendment was to preserve the right to a jury trial as it existed in 1791." *Curtis* v. *Loether* (1974).

The importance of the seventh amendment to this bill was established a few weeks ago when the Supreme Court held that a civil enforcement action by EPA must be accorded full jury trial rights. *U.S.* v. *Tull* (1987). This cast doubt upon the power of Congress to assign civil causes of action to ALJs for adjudication.

The Supreme Court has held that "public rights" may be transferred to administrative fori without constitutional implications. "Private rights," on the other hand, remain subject to the full protections of the seventh amendment. *Atlas Roofing* v. *OSHA* (1977). If this distinction were not acknowledged, Congress would be able to strip Federal courts of cases under the guise of creating new administrative actions.

The main question for this hearing, and a question that I acknowledge to be somewhat open, is what constitutes a "public" as opposed to a "private" right. This is a uniquely legal question and calls for careful legal, rather than political, analysis.

In this regard, we will need to examine closely the principles that distinguish between private "tort, contract, and property cases", which may not be assigned to administrative adjudication, and public rights, which may. For instance, we will need to examine the case of *Curtis* v. *Loether*, which held that a fair housing action for damages "basically sounds in tort." In addition, we will wish to examine the conclusions of the Justice Department, including an analysis by the Carter administration in 1978 that an earlier version of this bill would probably be unconstitutional.

Although I wish to reserve final judgment until we have examined more closely the merits of this legal issue, one point seems to be clear. This bill authorizes the Secretary of HUD to initiate actions in administrative courts on behalf of private litigants. If these are essentially private rights, however, the Secretary's participation would not transform them into something of a different character. Otherwise the seventh amendment would essentially not bind Congress because Congress could authorize Government participation in any kind of case and thus remove it from the protections of federal court and juries.

I look forward to examining these legal distinctions with the current Justice Department. In that connection, I am very pleased to welcome Assistant Attorney General Bradford Reynolds to the committee.

Senator KENNEDY. We will start off with you, Mr. Reynolds, and we look forward to your testimony.

STATEMENT OF WILLIAM BRADFORD REYNOLDS, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. REYNOLDS. Thank you, Mr. Chairman. I appreciate the opportunity to appear before the subcommittee today and discuss the Justice Department's views regarding the Supreme Court's recent decision in *Tull* v. *United States* and the impact of that decision on current congressional efforts to amend the Fair Housing Act.

I believe that it is fair to say that the views of the administration will differ some from the ones that you just stated, and I think it is important to have that discussion and difference of opinion on the record.

Let me preface my remarks on this discrete subject with a strong reaffirmation of the administration's support for amendments to title VIII that will enhance enforcement capability under the statute and ensure more comprehensive coverage.

To this end, the administration has in the past endorsed fair housing legislation that seeks to correct deficiencies in the existing law and is presently undertaking to fashion a compromise bill that will serve the same purpose, while meeting concerns raised by Senate bill 558.

As I earlier testified in hearings before the subcommittee back in April, this latter effort is focused in significant part on an alternative procedure to the administrative law judge process that is contained in Senate bill 558. That alternative procedure contemplates resort to formal arbitration as a means of resolving disputes arising from complaints of housing discrimination which have no prospect of conciliation.

Compensatory and limited punitive damages were among the remedies that we were considering making available to the arbitrator, remedies which resemble the relief available in Senate bill 558 under the proposed ALJ process.

With the Supreme Court's decision in *Tull*, we have been forced to rethink our earlier position concerning the fair housing amendments. In *Tull*, the Court held that a defendant was entitled to have liability determined by a jury in a district court action brought by the United States seeking equitable relief and civil penalties pursuant to the Clean Water Act.

Central to this determination was the seventh amendment, which guarantees that, "In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ."

Differentiating between actions at law to which the seventh amendment applies and actions in equity to which it does not, the Court focused principally on the request for civil penalties.

"A civil penalty was a type of remedy at common law that could be enforced in courts of law," it stated. The intent was essentially punitive rather than one aimed at "extracting compensation or restoring the status quo" and, consequently, under the *Tull* decision such relief could issue only after a jury determined liability in a court of law. Similarly, actions seeking punitive damages are, according to *Tull*, subject to the seventh amendment jury trial requirement.

For present purposes, I think it is fair to conclude that the most obvious and certain effect of *Tull* is that under both Senate bill 558 and the alternative proposal being considered by the administration, each of which contemplates court awards of civil penalties and punitive damages, fair housing defendants would be entitled, on demand, to a jury trial on the issue of title VIII liability in any case brought against them in an article III court, whether it be in a private enforcement action or a "pattern or practice" action brought by the Attorney General.

Senator KENNEDY. Of course, no one is disputing that. That is non-controversial. Our bill does not preclude such a result.

Mr. REYNOLDS. I was trying, Mr. Chairman, to just lay out the legal analysis that I think flows from the *Tull* decision.

Senator KENNEDY. All right, fine. Thank you.

Mr. REYNOLDS. This reading of the Court's decision takes us beyond where we were prepared to go under a seventh amendment analysis prior to *Tull*. Our sense then, as we unsuccessfully argued in the *Tull* court, was that civil penalties need not implicate the constitutional right to jury trial, but can appropriately be understood in some circumstances as essentially equitable relief. The Court has now advised us otherwise.

There is another sobering ramification of *Tull*. A key to the Supreme Court's resolution of the seventh amendment question in the case rested essentially on whether the cause of action sounded in law or in equity.

That analytical approach would appear in the present context to give added prominence to an earlier Supreme Court decision in the case of *Curtis* v. *Loether*. There, the Court held that a jury trial would be constitutionally required in an article III court action so long as the private litigant could recover the traditional "legal" remedy of actual, compensatory damages. "A damages action . . . sounds basically in tort," the Court concluded in that case. Nota-

bly, *Loether* involved a lawsuit by an aggrieved person under section 812 of the Fair Housing Act.

To be sure, neither *Tull* nor *Loether* addressed directly the separate question whether Congress can properly circumvent the seventh amendment jury requirement by assigning housing disputes to administrative tribunals, whether ALJs or formal arbitration, for resolution in the first instance. There is Supreme Court precedent at least suggesting such a possibility.

Senator KENNEDY. Well, you see, I think that is a key point in our consideration because you recognize in your own testimony that *Tull* and *Loether* did not address directly the separate question whether Congress can properly circumvent. You leave that open and then you come to the conclusion, at least, that there is Supreme Court precedent at least suggesting a possibility.

I mean, I think that is very useful for those of us who are supporting this. You might draw a different conclusion. You are not all the way to where we are, but it seems to me that you are at least indicating, testifying for the administration, that it is an open issue and that there is a good argument to make in favor of it. That is the way I read that testimony.

Mr. REYNOLDS. If I may proceed, let me further explain it.

Senator KENNEDY. What I would like to do is follow this along.

Mr. REYNOLDS. Right.

Senator KENNEDY. We are going to have an opportunity to exchange, but I think we have got just a small group here. I generally would wait until we all got through for questions, but what we are interested in is really testing and probing the administration's position in the law on it.

I think when these questions come up and are raised, it is generally useful to try and explore them a little bit. I will resist some questions, but I would as we go on through—you were good to get the testimony up here and we have had a chance to review it—like to be able to try and test these out, rather than sort of going back over the whole testimony again when we get back in.

I do not want to interrupt you, but I do think just in a few other areas I would like to probe as you go through. Thank you.

Mr. REYNOLDS. Well, I think that is helpful. Let me just remark on that, that I think that it is the case that we are dealing here with questions that are not easy. They are complex legal issues. There are people on both sides of the issue and I would not pretend to come up here and suggest otherwise.

I think that this is one of those issues where we indeed were on the other side. We have three opinions of the Office of Legal Counsel that have addressed this question. They are not all in line with one another, so I would readily accede, Senator, that there is certainly room for some argument on this.

I think it is true that *Tull* and *Loether* are not directly on point and that *Atlas Roofing* would raise the suggestion, as I indicated, of the possibility that the assignment of this could go to an administrative law judge.

However, I think that the better analysis leads to the opposite conclusion, and that is really where my testimony now is directed. I think in the present context, *Atlas Roofing* seems to cut against the proposed fair housing amendments that seek to substitute an

administrative process, with complete compensatory and punitive damages, for Article III adjudication.

The Supreme Court in that case drew a distinction between what it termed "public rights" and "private rights." As it there explained——

Senator KENNEDY. Could you hold just a moment, Mr. Reynolds? I just want to confer.

[Pause.]

Senator KENNEDY. You can proceed. I will be right back.

Mr. REYNOLDS. Shall I continue, Senator?

Senator Specter [presiding]. Sure.

Mr. REYNOLDS. I was about to quote from the *Atlas Roofing* case where they said,

> Our prior cases support administrative factfinding in only those situations involving public rights; e.g., where the government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract and property cases, as well as a vast range of other cases, are not at all implicated.

Senator SPECTER. Where are you reading from, Mr. Reynolds?

Mr. REYNOLDS. I am on page 4, I believe, of the copy of the testimony, bottom of page 4.

Senator SPECTER. Thank you.

Mr. REYNOLDS. There is admittedly no clear bright line between what are appropriately regarded as "public rights" and what are appropriately regarded as "private rights," and Supreme Court precedents in this area have failed to provide precise definitions.

Nonetheless, when the holding in *Loether*—to the effect that a damages claim under the Fair Housing Act sounds basically in tort—when that ruling is read together with the most recent seventh amendment ruling in *Tull*—that categorically rejected our invitation to regard civil penalties as equitable relief rather than a remedy at common law—the decided tilt appears to be against the constitutionality of the sort of administrative provisions that are currently under consideration.

Thus, since the Supreme Court has now ruled that both the cause of action under the Fair Housing Act and the remedies of the type that are provided under the Fair Housing Act Amendments are the type that would have required liability to be determined by juries when the Constitution came into being, there is a strong presumption that these cases must remain within the exclusive domain of article III judges and juries.

Other indicia of unconstitutionality are found in the *Atlas Roofing* case as well. Wholly apart from its lineage as a common law tort, the right at issue under the Fair Housing Act is not public in any traditional sense.

Congress itself recognized at the time of its enactment of title VIII that housing disputes are by and large between a landlord and tenant or prospective tenant or the buyer and seller of a home. They do not raise larger issues between government and its citizens or call upon the government to sue in its sovereign capacity.

Indeed, it is precisely because of a recognition that such disputes are quintessentially private and in need of prompt resolution that an administrative process has been recommended in the present circumstances.

To the extent the proposed administrative procedure contemplates Secretary involvement, it is simply as a representative of particular claimants, not as an institutional representative.

Moreover, this is not an administrative process aimed at resolving agency disputes arising under a regulatory scheme, nor is it a procedure devised to deal with complex and technical issues requiring special expertise and competence beyond what is available in an article III court.

Rather, the entire impetus for the instant amendments is to supplement or displace article III courts and juries with a more streamlined and truncated review process responsive to the "quick turnaround" housing needs of individual claimants.

In sum, amendments proposed by Senate bill 558 and contemplated in the administration's alternative arbitration proposed would authorize private litigants to pursue traditional common law remedies to recover "legal" damages——

Senator SPECTER. Mr. Reynolds, I am reluctant to interrupt you, but I am told that there is going to be an announcement on the Supreme Court nominee at 2:30 and I think that we are going to want to hear that.

Mr. REYNOLDS. All right.

Senator SPECTER. We have your full written text. I wonder if I might focus on just one or two points. I realize that there has been reevaluation by the Department of Justice on this issue, but a prior opinion handed down by your division on February 8, 1985, had as its conclusion, "Because we believe that the courts would characterize the statutory right to non-discriminatory housing created by S. 1220 as a public right, Congress, consistent with article III, may vest the adjudication of public housing discrimination claims in an administrative tribunal."

My question is, What led to that conclusion that differs today? Why the change in position?

Mr. REYNOLDS. Well, I think there are a couple of reasons. One reason is that that particular opinion relates to the 1985 bill, which did not have as a feature of it, punitive damages in the ALJ process.

Senator SPECTER. Do you think if we removed the punitive damages aspect it would be clearly constitutional?

Mr. REYNOLDS. Well, I think that would certainly help the matter. I think there are two other factors which would suggest to me that even if you removed that, that if you were to have compensatory damages there would be a problem, and that is two intervening cases since the 1985 case.

One is the *Thomas* case, which was decided, I think, in the latter part of 1985, and made the point that the Secretary's participation, if it is only formal participation, is not sufficient to alter the situation.

One of the factors that was leaned on quite heavily in the 1985 opinion was that if the Secretary is going to be the one that brings the lawsuits, they felt that that might move it from the private to the public arena and allow for administrative proceedings.

The *Thomas* case came down and made it quite clear that that would not be something that could be very helpful in the constitu-

tional analysis if, indeed, the Secretary was suing on behalf of the individual litigants.

The other one is the *Tull* decision, which adds the feature that I mentioned earlier where the Court said that you look to the relief prong as well as the liability prong, and if the relief that you are looking for is legal relief, then there is a seventh amendment requirement that you cannot circumvent.

Senator SPECTER. But *Tull* said that the right to a jury trial applied only to the liability aspect and analogized it to a claim for contract.

Mr. REYNOLDS. But it said that you look to the nature of not only the cause of action, but the nature of the remedial—what remedy or relief is being sought. If that is "legal" in nature, that is also an element that will implicate the constitutional requirement under the seventh amendment; because the seventh amendment requirement would be one that, at common law, would require a jury trial where you are talking about a cause of action that was available at common law and a legal remedy that was legal in nature at common law.

In fact, we had briefed in *Tull* to the Court that that second feature was indeed not important; that you could bifurcate and you could simply treat the remedy as an equitable remedy.

In the *Tull* case, we said that in those circumstances you would not need to have a jury trial by bifurcating it. The Court rejected that—in fact, I think, unfortunately, it was unanimous—and told us that we were wrong in that assessment and that they would look to the remedy and the fundamental nature of the remedy, and that would influence considerably the jury trial requirement.

Senator SPECTER. But they agreed with you as to the conclusion that a jury trial was not required under the *Tull* opinion on the remedy aspect.

Mr. REYNOLDS. As to whether or not you need a jury to determine the amount of the remedy, which is a different question, they said that they did not rule that you needed this as to the amount of the remedy.

But as to whether the defendant was entitled to a jury trial under the seventh amendment, they said he was because the nature of the cause of action, as well as the remedy, were both legal and recognizable at common law and that would require a seventh amendment conclusion.

Senator SPECTER. Well, in the *Tull* case the Court said that you had to have a jury trial on the liability aspect.

Mr. REYNOLDS. Right.

Senator SPECTER. But the Supreme Court concluded that you did not need a jury trial on the remedy aspect.

Mr. REYNOLDS. Well, the point is, though, that you do get the jury trial, and the jury trial is determined to be required under *Tull* because the nature of the cause of action and the relief that you were seeking both were legal in nature. That was the character, and you look to that fundamental character.

The Government was not looking for an equitable remedy. It was a civil penalty in that case which was by its nature legal, and the Court said "that is an element that we look to," and if you have that in addition to the traditional common law analog with regard

to the cause of action, the two of them together point you very directly in the direction of requiring a jury trial.

The reason that I think that is important is that the 1985 opinion, as did our brief in *Tull*, made much of the fact that if we could say that the kind of relief that you are looking at in the administrative process which goes beyond equitable—that is, it goes beyond just placing somebody back in a house and "make-whole" relief, the kind of relief is civil penalties or punitive damages which are tangential to the fundamental equitable relief—then that should not be a basis to conclude that you have to have a jury trial, but the Court rejected that argument.

Senator SPECTER. But the Court decided in *Tull* that you did not need a jury trial on the civil penalties. The Court said this at page 4,575 of 55 Law Week.

> The seventh amendment is silent on the question of whether a jury must determine the remedy in a trial which must determine liability.

Then, farther down.

> Congress' assignment of the determination of the amount of civil penalties to trial judges therefore does not impinge on the constitutional right to a jury trial. Since Congress itself may fix the civil penalties, it may delegate that determination to trial judges.

Mr. REYNOLDS. Of course, here we are talking about determining liability. That is what the amendments look to in the Fair Housing Act we are talking about, and all I am saying——

Senator SPECTER. I am coming to that. That is the public right versus the private right.

Mr. REYNOLDS. Right.

Senator SPECTER. But you were on the point that the Court in *Tull* had made a determination as to the jury trial issue on remedy as well as liability.

Mr. REYNOLDS. They did say that as to determining the amount of the damages, that was something that could be determined by the judge, but that where the determination of liability and just general damages follow or just liability is one that the jury is required to determine.

What they said is, "we will look to the nature of the cause of action." Is it legal or equitable? It is legal. And we will also look to the nature of the relief that you are seeking—just look to the nature.

If the nature of the relief that is being sought is by nature "legal", that will also influence the question of whether you are entitled to a jury trial on the liability question.

It does not mean, once you say yes to that, that you cannot say the judge will determine, if it is yes to liability, the amount of damages. That can be assigned to a determination by the judge.

Senator SPECTER. But, Mr. Reynolds——

Mr. REYNOLDS. But one of the factors that the Court said very definitely——

Senator SPECTER. Well, let me interrupt you for just a minute.

Mr. REYNOLDS [continuing]. Influences it is the character of the relief, as well as the character of the cause of action. Where they are both "legal", it said that you are looking at a jury trial.

Senator SPECTER. But is not the real essence of *Tull* its recognition, as noted in the footnote, "The Court has also considered the practical limitations of a jury trial and its functional compatibility with proceedings outside of traditional courts of law in holding that the Seventh Amendment is not applicable to administrative proceedings," citing *Atlas*.

And then if you come back to *Atlas*, you have the very strong opinion of the Supreme Court that administrative law judges may proceed without having a jury trial. It seems to me, then, that the strand of your argument, having said that it is a complex issue and having had the previous opinion from the Department of Justice on it—what substance there is for your argument turns on public versus private.

You say at pages 5 and 6 of your statement that the question is whether it is essentially a dispute between a landlord and tenant or prospective tenant or the buyer and seller. "They do not raise larger issues between government and its citizens or call upon the government to sue in its sovereign capacity."

It seems to me that with HUD as a party, you really have the government suing in its sovereign capacity, although I agree it is not conclusive. But perhaps the more fundamental consideration is whether it is a private right of action or whether it does not embody something which is more fundamental on, as you put it, the larger issue between government and its citizens.

What the Congress is seeking to do here is to establish a standard of conduct to ensure fairness in housing, in renting and in sales. That broader standard of conduct is societal in nature and goes beyond private interests of the specific landlord-tenant or buyer-seller.

So is not the thrust of what we are trying to achieve here really pretty clearly within the domain of the public right?

Mr. REYNOLDS. Well, I think that it certainly states a public policy interest, and a strong public policy interest. But I think that one needs to be careful because virtually everything that this body does up here is to further a strong public policy interest. Indeed, that is the underpinning of legislation.

The argument that that public policy interest, that drives Congress to legislate, is enough to circumvent the seventh amendment, it seems to me, argues too much. I think that what you have to look to are the private rights that are vindicated by the statute and that are the subject of the other legislation that is indeed put in place by this broad public policy interest.

I would be concerned—I mean, I know you have expressed some considerable concern about court-stripping——

Senator SPECTER. I have.

Mr. REYNOLDS [continuing]. And the difficulties that adhere when Congress takes away from the courts certain jurisdiction. If the public policy interest is indeed sufficient to remove from article III courts adjudication and assign them to the political process or another branch, it seems to me it raises the same kind of concerns in the court-stripping context.

I think that that is why one has to look, as the Court has suggested—and I think most notably Justice Brennan's dissent in the *Shore* case—one has to be concerned about the separation of

powers issue and look not to whether there is a broad public policy being furthered or advanced by the legislation, but whether the interests implicated with regard to the statute in question are ones that go to government regulatory schemes or the government as a sovereign operating with the citizenry. Or are they private rights actions among citizens, which I think in this case clearly is what Congress had in mind.

Senator SPECTER. Well, I certainly do not condone court-stripping. It seems to me that this sort of a statute establishes a public right. If you take a look at the evolution of the criminal law, it started off several hundred years ago in the court field, and then there were treble damages.

Private parties still have very substantial rights to enforce the criminal law. But, ultimately, criminal law, which is the definition of a public right—it is Commonwealth versus or State of New York versus or United States of America versus John Defendant—has established the public right in what had been historically a private context.

The critical aspect to me is when there is really a societal interest or a public policy in a broad definition which seeks to establish a standard of conduct where there is a broad societal interest. I will try to steer away from the words "public right."

These cases are not easy, as the courts have interpreted them. I think they have added a lot of complexity, but in something as basic as housing and a declaration of policy of trying to get equality in housing, and considering the scope of equality as a constitutional right, we are far beyond a private interest of one citizen versus another and we are in the public domain.

Senator Kennedy, you may know who the next Supreme Court Justice is, but I do not, so I am going to excuse myself at this point.

Senator KENNEDY. We are all going to hear at 3 o'clock.

Senator SPECTER. No; it is 2:30.

Senator KENNEDY. Well, they will announce it at 2:30, but I will not be the one to do it. I will have something to say about it, which will keep my questions a little shorter than I had thought. [Laughter.]

Senator SPECTER. Maybe we could ask Mr. Reynolds if he would care to digress from the stated topic and inform us on a broader range of interest.

Mr. REYNOLDS. I am afraid I am not at liberty to do that, Senator. [Laughter.]

Senator KENNEDY. The whole question about private and public rights is a key element in terms of distinguishing between our positions. I just got back into the hearing to hear the exchange, and this is something that there is a difference on.

I share the feeling of Senator Specter that the overwhelming evidence supports our position, but there is some difference on it.

Senator DeConcini.

Senator DECONCINI. Thank you, Mr. Chairman.

Mr. Reynolds, I would like to broach it on the basis that traditionally judges determine equitable relief such as injunction and restitution. They do that without a right to a jury, and yet causes of action available at common law areas require the jury trial, as I understand the seventh amendment, in court cases.

What I would like to know from you is do you consider the violation of fair housing as a matter in equity or what would be known as tort law?

Mr. REYNOLDS. I believe it is a violation in what would be known as—or much more analogous to a violation in tort law. The Supreme Court spoke to that in *Curtis* v. *Loether*.

Senator DECONCINI. Did they conclude that?

Mr. REYNOLDS. They concluded it was analogous to a tort action and that a jury trial was required, and it involved section 812 of the Fair Housing Act.

Senator DECONCINI. Does fair housing legislation such as we have here create a public right of action or does it create a right of private action against those who discriminate?

Mr. REYNOLDS. I think it creates very definitely a right of private action against those who discriminate.

Senator DECONCINI. Only?

Mr. REYNOLDS. Well, the Attorney General can bring an action against an individual who discriminates on pattern and practice, but I do not think that that creates a public right.

Senator DECONCINI. OK.

Mr. REYNOLDS. I think it is to vindicate the private rights of those individuals who have been discriminated against.

Senator DECONCINI. Who have been discriminated against?

Mr. REYNOLDS. Yes, Senator.

Senator DECONCINI. Is the consent of the parties—well, let me go to this. Maybe you testified in your statement and I did not see it about having a magistrate hear the issue. Constitutionally, that does not trouble you, if they consent?

Mr. REYNOLDS. Not at all. I think that you can consent, and if it is voluntary, if you have a voluntary process for conciliation, that would be certainly a permissible feature.

Senator DECONCINI. If that were part of the final bill, what would your feeling be if that were the process that was instituted?

Mr. REYNOLDS. I think if the bill had as a part of the process a means to consent to some kind of a non-article III disposition that contemplated the award of damages, that would be something that would survive——

Senator DECONCINI. The constitutional test?

Mr. REYNOLDS. The constitutional test, because I think if the parties voluntarily submit to that, the defendant will have waived whatever jury trial right he would have otherwise on demand.

Senator DECONCINI. And, of course, your testimony is that submitting these to an administrative law judge would be a constitutional question, in your judgment?

Mr. REYNOLDS. Well, submitting it to an administrative law judge where the administrative law judge is authorized to award compensatory damages, penalties or punitive damages.

Senator DECONCINI. Right.

Mr. REYNOLDS. If you were to have an administrative law judge process that was confined to make-whole relief, giving people the apartment, that kind of thing, then I think that that would not run into the difficulties constitutionally that I have outlined.

Senator DECONCINI. And if you go back to the expedited procedure of a magistrate hearing it, there is no question that with con-

sent of the parties they could do both of those things. They could order the reinstatement and also whatever damages might be sought or proven or finally adjudicated?

Mr. REYNOLDS. If the parties consent to that process, I do believe that could be done, and done well within the constitutional requirements.

Senator DECONCINI. Would you support the bill if that were part of it?

Mr. REYNOLDS. We have been working on an alternative, Senator, that would contemplate that feature as being a part of it, and I think that what we would have to do is work through exactly how all those pieces fit together.

But I do not have the constitutional concern with a process outside of the article III process that allows for an expedited disposition of discrimination claims we had suggested before in an arbitration context, or maybe even an ALJ context, if the relief that we are talking about is equitable in nature.

Senator DECONCINI. Could you have a little bit of both where you have the decision made as to reinstatement by the administrative law judge and then by consent to determine any damages by a magistrate? Would that pose any constitutional problem?

Mr. REYNOLDS. A magistrate that was agreed to under a process that was agreed to by the parties?

Senator DECONCINI. Excuse me?

Mr. REYNOLDS. Under an agreed referral to the magistrate?

Senator DECONCINI. Yes, sir, as to the damages.

Mr. REYNOLDS. I think that would probably be workable.

Senator DECONCINI. Very good. I have a couple of other questions that I will submit.

Mr. REYNOLDS. You could also submit the damages question to a jury determination.

Senator DECONCINI. Oh, sure, I understand that.

The Senator from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Reynolds, in what capacity are you testifying today? Are you giving us your views, the Department of Justice's views, or the administration's views on these legal issues?

Mr. REYNOLDS. I certainly am here as the Assistant Attorney General of the Department of Justice. My testimony has been reviewed and cleared through all the channels that are required and it is an administration position that is being stated.

Senator THURMOND. In other words, this is Department of Justice's views and also the administration's views?

Mr. REYNOLDS. That is correct, Senator.

Senator THURMOND. Mr. Reynolds, critical to any analysis of the seventh amendment issue is an understanding of how the *Tull* case is to be read in conjunction with *Atlas Roofing*.

Central to that analysis is footnote 4 in *Tull*. How do you explain that footnote?

Mr. REYNOLDS. Well, I am not sure that it is totally explainable. I think that what the footnote says is that to the extent that there is an incompatibility that one might suggest as a reason not to have juries and an administrative process, that alone is not going to be considered as a justification to—I think what you are saying is that

is not going to be considered as a justification for not extending the jury trial right.

In other words, I think what they have said is there are, in certain circumstances within the administrative process, as they have ruled in the past, legitimate ways in which you can adjudicate a particular kind of equitable proceeding without going to jury trial, and nothing that they say in *Tull* is going to upset that particular line of cases.

But the analysis that they have laid out in *Tull* would, I think, also require the conclusion that that line of cases will not tolerate a denial of jury trial where the right that you are dealing with is a private right, where indeed you have got the kind of legal remedy that is being sought that would require that an article III court adjudicate the matter.

In essence, I think all it is saying is that we have ruled in past cases that there are situations where you can use the administrative process. We are not denying that in appropriate cases there is room to do that, but that at the same time there is good and sufficient law on this and that that has to be looked at in each case.

Senator THURMOND. Mr. Reynolds, witnesses in support of this bill cite several cases to uphold the constitutionality of S. 558. I believe these cases do not support these claims and are clearly distinguishable.

I would like your comment on what support the following cases do or do not give to S. 558 and a brief response on why you reach that conclusion. There are four cases here I will give you—the *Crowell* case, the *Shore* case, the *Jones and Laughlin* case, and the *Thomas* case.

Mr. REYNOLDS. Well, *Crowell* was a case involving an admiralty claim, and therefore sounded in equity. The Court distinguished admiralty as long being one that was an equity action, not a common law claim. I think that that certainly fits within what has traditionally been removable to an adjudicatory process.

Shore is a case where I believe the Court basically was saying that you have a public right that is involved. There was a counterclaim that was ancillary to it that involved a private claim, but it was essential that the public right adjudication be resolved.

The private claim could not be resolved in the absence of the public right. The scheme that Congress had set up was one that was legitimate under all the precedents to be submitted to an ALJ process.

They said in those circumstances where the private claim is an ancillary one to the adjudication of a public right, there would be room to, in those circumstances, look at that private claim in that context.

I am not sure. The other two were——

Senator THURMOND. *Jones and Laughlin,* and *Thomas.*

Mr. REYNOLDS. Well, *Jones and Laughlin* involves a scheme where you have the government suing in its sovereign capacity in, I think, the most classic sense, and the relief that was being sought there was also equity by nature, not legal. It was reinstatement and back pay.

When you have that combination, public right and an equitable remedy that is being sought, the Court has said quite clearly that

it is one that can be adjudicated outside the article III court system and you can indeed avoid the jury trial.

And the last one was *Thomas?*

Senator THURMOND. The *Thomas* case.

Mr. REYNOLDS. Thomas involved the Federal Insecticide, Fungicide and Rodenticide Act, and it is a new series of legal rights that were enacted by Congress pursuant to a regulatory regime that very much in the nature of what the Court defined in *Atlas Roofing* as a public versus private right.

It was a public right where the government was indeed operating as the government to administer and enforce a regulatory regime, a rather comprehensive one. It seems to me that that very easily falls into the camp where you can say that a jury trial under the seventh amendment need not be required because it is not the kind of common law legal right that is referenced in the seventh amendment.

Senator THURMOND. Thank you very much, Mr. Reynolds. I may have a few more questions and you can answer them for the record.

While you are here, I want to take this opportunity to congratulate you on the great work you are doing for the administration.

Mr. REYNOLDS. Thank you very much, Mr. Chairman.

Senator THURMOND. Thank you very much, Mr. Chairman.

Senator. DE[illegible]NCINI [presiding]. The Senator from Utah.

Senator HATCH. Thank you, Mr. Chairman.

Mr. Reynolds, in the case of *Curtis* v. *Loether*, the Court held that an action for damages under the fair housing provisions of the Civil Rights Act of 1968 "basically sounds in tort," and a jury trial therefore was required.

That case was decided the day after the Court had heard oral argument in *Pernell* v. *Southall Realty*, in which opinion they stated, "We may assume that the seventh amendment would not be a bar to Congressional efforts to entrust landlord-tenant disputes, including those over the right to possession, to an administrative agency."

Can those cases be reconciled?

Mr. REYNOLDS. Well, the language in *Pernell* was dicta. I think they can be reconciled because I read the dicta that you made reference to in *Pernell* as acknowledging that in the circumstance where you are talking about equitable relief only, you could, in a landlord-tenant dispute, indeed have it resolved outside the article III court without doing violence to the seventh amendment requirement.

I do not read *Pernell*—as I say, it is dicta and there was no further expansion of it, but I do not read *Pernell* on its own terms as going any further than that. Certainly, in light of the subsequent cases, I think that it would be impermissible to suggest that that dicta in *Pernell* can be read as saying that you could assign a Fair Housing Act claim seeking punitive damages and compensatory damages to an ALJ without doing violence to the seventh amendment.

So I think that there is a reconciliation there that is quite comfortable, although I have to say that it is a rather cryptic phrase and because it is dicta it is not altogether clear how they fit togeth-

er if one were to have the benefit of a fuller discussion by the Court in *Pernell.*

Senator HATCH. The legislation before us is, of course, not new. In fact, it has been around for a number of years, as you and I both know. Do the administration's current findings on the constitutionality of the proposed administrative adjudicatory proceedings differ significantly from the findings of previous years?

Mr. REYNOLDS. Well, actually, in 1978 this question came up with regard to a Fair Housing Act that was very much the same as the one that is being proposed in Senate bill 558, and the Office of Legal Counsel issued an opinion at that time that indicated that the administrative law judge piece of it would suffer constitutionally.

We did have an opinion by OLC in 1985. The statute was different then. There were no punitive damages that were contemplated in the administrative law judge piece of it, and there was some indication by the OLC opinion that it could survive constitutional attack.

But since then, there have been Supreme Court decisions in *Thomas* and *Tull* that seem to undermine considerably the 1985 opinion, and as a result of that, the opinion rendered by the Office of Legal Counsel in 1987 dealing with these most recently opinions comes to the conclusion that you cannot constitutionally square an administrative law judge process that looks like Senate bill 558 with the seventh amendment requirement.

Senator HATCH. Now, this bill, S. 558, permits an ALJ to impose punitive damages, as you have mentioned, on a litigant. Do punitive damages tend to make this a public or a private right?

Mr. REYNOLDS. Well, I think that the Court told us in *Tull*—that was probably the additional piece of information that we received from *Tull.* I think that what the Court told us in *Tull* is that punitive damages and indeed civil penalties—and I would suspect compensatory damages—are legal in nature.

By virtue of their legal nature, they implicate the constitutional question and suggest that a jury trial is required. I think that that is an additional feature that we learned from *Tull* that we had not had before. We had actually argued in the *Tull* case a different conclusion and the Court had rejected that.

Senator HATCH. The general counsel at HUD sent you a letter on May 7 which concluded that *Tull* might be read to provide support for the assignment of fair housing cases to administrative law judges.

Now, have you considered that viewpoint in reaching the conclusions you have here today, and do you agree with that conclusion?

Mr. REYNOLDS. Well, I have considered, and I think in fairness to the general counsel I should say that that was a letter that was written shortly after *Tull* and he acknowledged to me that he had not had the time to go through a full analysis of the matter.

We agreed to submit the question to the Office of Legal Counsel for the kind of full analysis that was required, and I think that the Office of Legal Counsel has responded to that letter.

I also have written a letter to the general counsel in response, and I would ask, I guess, if it would be all right if I could have that

submitted for the record as well so that the other half of his correspondence is part of the record of this proceeding.

Senator HATCH. I would like to have both that and the Office of Legal Counsel opinion put in the record.

Senator DECONCINI. Without objection.

Mr. REYNOLDS. Thank you.

[Material for the record follows:]

U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

JUN 8 1987

MEMORANDUM FOR WILLIAM BRADFORD REYNOLDS
Assistant Attorney General
Civil Rights Division

Re: Use of Punitive Damages in the Fair Housing Act

This responds to the request of Deputy Assistant Attorney General Mark Disler for our opinion on the Seventh Amendment issues raised by the use of civil penalties and punitive damages in proposed amendments to the Fair Housing Act, 42 U.S.C. 3602-3631. The Civil Rights Division has drafted a bill entitled "Fair Housing Amendments Act of 1987" ("draft bill"), while the Senate is considering S. 558.

The draft bill and S. 558 raise three questions. First, may an arbitrator award anything other than equitable relief in a voluntary arbitration proceeding? Second, is the defendant in a civil action entitled to a jury trial on the issue of liability for civil penalties? Third, may an arbitrator or an administrative law judge award compensatory damages, punitive damages, or civil penalties in an administrative proceeding?

I. Analysis

(a) Punitive Damages in Voluntary Arbitration

The first question is whether an arbitrator may award damages in a voluntary proceeding under section 812 of the draft bill. The section would permit the parties to agree to voluntary arbitration that would be binding on the parties. Section 812(a)(2).[1] There is certainly no impediment to the arbitrator in such a voluntary proceeding imposing the equitable relief now outlined in the draft bill: a permanent or temporary injunction and restitution. Nor do we believe that the Seventh Amendment precludes the parties from agreeing voluntarily to submit their dispute to an arbitrator who could impose punitive damages. In these circumstances, both parties will have waived any Seventh Amendment rights that would otherwise obtain.

---

[1] Section 812(a)(5) provides sufficient safeguards to insure that the hearing will be conducted according to rules that provide for presentation of witnesses and evidence so as to satisfy any due process concerns.

The question whether this proceeding is consistent with Article III of the Constitution is somewhat more problematic. The voluntary participation of private litigants in a proceeding outside the confines of the federal judiciary does not ipso facto insulate it from Article III attack. Commodities Futures Trading Comm'n v. Schor, 106 S.Ct. 3245, 3257-58 (1986) (Schor). The Court in Schor emphasized that the strictures of Article III (unlike the protection of Seventh Amendment) cannot be waived by the consent of the parties. Id. at 3257-3258. For the reasons discussed more fully below, however, we believe that the arbitration proceeding contemplated in section 812 of the draft bill would survive Article III scrutiny because a very similar administrative scheme was upheld in Schor primarily because of its voluntary nature. Id. at 3260.

(b) Jury trial in civil action

On the issue of liability for punitive damages, we believe that the Seventh Amendment entitles the defendant to a jury trial in a civil action under either section 814(c) of the draft bill or section 813 of S. 558.

The Supreme Court recently held that suits by the Government to recover civil penalties are analogous to a common law action in debt, an action covered by the Seventh Amendment's requirement of a jury trial. Tull v. United States, No. 85-1259 (U.S. April 28, 1987) (Tull), slip op. at 9-12. Therefore, the defendant in an action to recover a civil penalty under the Clean Water Act, 33 U.S.C. 1319(d), is entitled to a jury trial. The Court distinguished between actions at law, which are covered by the Seventh Amendment, and actions in equity, which are not.[2] Tull, slip op. at 4. Noting that civil penalties were punitive in nature, and were intended to do more than make the offender disgorge unlawful profits, the Court in Tull observed:

> A civil penalty was a type of remedy at common law that could only be enforced in courts of law. Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity.

Id. at 10. The Court analyzed the legislative history of the Clean Water Act's penalty provision and determined that it was intended to punish offenders and therefore reflected "more than a concern to provide equitable relief." Id. "Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties." Id. Tull therefore stands for the proposition that civil penalties that

---

[2] Actions at equity include temporary and permanent injunctions and orders, such as reparations, that restore the status quo.

are designed to punish are actions at law that must be tried to a jury under the Seventh Amendment. See also Curtis v. Loether, 415 U.S. 189, 194 (1974). The determination in a civil action of liability for "punitive damages" thus requires a trial by jury. Punitive damages are designed to punish and were, not surprisingly, identified by the Court as another kind of action at law that requires a jury trial. Id., slip op. at 9 n.7. Therefore, a defendant in an action brought under section 814(c) of the Act or section 813 of S. 558 would be entitled to a jury trial.

Moreover, even if civil penalties or punitive damages were not available, a jury trial would still be required so long as a private litigant could recover actual, compensatory damages. The Court in Curtis, noting that "[a] damages action sounds basically in tort," held that a suit by an aggrieved person to collect damages under section 812 of the Fair Housing Act required a trial by jury. Id. at 194-195.

(c) Seventh Amendment and Article III: Permissibility of Administrative Adjudication

Having concluded that an action for compensatory or punitive damages would require a jury trial in an Article III court, we turn to the most difficult question posed by the draft bill and S. 558: whether providing precisely the same cause of action in an administrative tribunal where no jury is available can survive constitutional scrutiny under the Seventh Amendment and Article III.

(1) Case Law

The Supreme Court has held that the Seventh Amendment does not prohibit Congress from assigning adjudication of certain statutory rights to an administrative forum, even if a jury would have been required under the Seventh Amendment had Congress assigned adjudication of the same rights to a federal court. Atlas Roofing Co. v. Occupational Safety and Health Comm'n, 430 U.S. 442 (1977) (Atlas Roofing).

> At least in cases in which "public rights" are being litigated -- e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact -- the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.

Id. at 450 (footnote omitted). See also Tull, supra, slip op. at 5 n.4; NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Block v. Hirsh, 256 U.S. 135 (1921). The Court made clear, however, that actions involving "private rights" as distinguished from "public rights" could not be transferred to administrative proceedings.

> Our prior cases support administrative fact-finding in only those situations involving "public rights," e.g., where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, as well as a vast range of other cases are not at all implicated.[3]

Id. at 458.

The problem is that the Court has never stated with any clarity what distinguishes a public right from a private right.[4] "The distinction between public rights and private rights has not been definitively explained in [the Court's] precedents." Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69 (1982) (Northern Pipeline) (plurality opinion). But while the Court's application of the public rights doctrine has not been particularly consistent or coherent, the conceptual underpinnings of this theory are reasonably discernible.

Essentially, the public rights doctrine reflects the Court's recognition that the nature and historical backdrop of the federal right at issue are quite significant in determining whether con-

---

[3] Tull does not diverge from this line of cases. In a footnote, the majority stated:

> The Court has also considered the practical limitations of a jury trial and its functional compatibility with proceedings outside of traditional courts of law in holding that the Seventh Amendment is not applicable to administrative proceedings. But the Court has not used these considerations as an independent basis for extending the right to a jury trial under the Seventh Amendment.

Id., slip op. at 5 n.4, citing Atlas Roofing and Pernell v. Southall Realty, 416 U.S. 363 (1974). We are not quite sure what these two sentences mean. At a minimum, however, they indicate that Tull is not meant to signal a reexamination of the principles underlying Atlas Roofing.

[4] We believe the public rights doctrine is primarily based on Article III principles and thus will discuss this issue principally in those terms. The conclusion that a right is "public" for Article III purposes would seem to subsume any Seventh Amendment objections on this basis. Cf. Atlas Roofing, supra, 430 U.S. at 456; Northern Pipeline, 458 U.S. at 67 n.18. In any event, in analyzing the public rights doctrine, the Court has treated the constraints of the Seventh Amendment and Article III as virtually coextensive, discussing and citing Seventh Amendment and Article III cases interchangeably.

gressional substitution of alternative tribunals for Article III courts impermissibly encroaches on the independence and authority of the federal judiciary. At one end of the spectrum, the Court has sought to prevent Congress from usurping the constitutional prerogatives of courts and, in some circumstances, juries, by removing from Article III tribunals matters which the Constitution's text, structure and history suggest are theirs to resolve. At the other end of the spectrum, the Court has perceived no plausible threat to an independent judiciary or trial by jury from non-Article III resolution of matters that are committed by the Constitution or historical consensus to political branches, and which thus "could have been determined exclusively" by the executive and legislative branches[5] absent any judicial review save that required by

[5] This and similar phrases, often repeated but rarely explained by the Court, apparently refer to those matters which the political branches could have disposed of in a summary fashion before the evolution of modern substantive and procedural due process theories. This would include those areas where the text of the Constitution grants plenary authority to one of the political branches -- such as immigration or taxation -- and disputes concerning the removal of "privileges" such as Government financial assistance, rather than "rights" as traditionally understood. "The understanding of these cases is that the Framers expected that Congress would be free to commit such matters completely to non-judicial executive determination, and that as a result there can be no constitutional objection to Congress' employing the less drastic expedient of committing their determination to a legislative court or an administrative agency." Northern Pipeline, 458 U.S. at 68. See also Crowell v. Benson, 285 U.S. at 50; Thomas v. Union Carbide Agricultural Products Co., 105 S. Ct. 3325, 3341 n.1 (1985) (Brennan, J., concurring). Moreover, "[t]his doctrine may be explained in part by reference to the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued." Northern Pipeline, 458 U.S. at 67. See also Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 283-285 (1856); Ex parte Bakelite Corp., 279 U.S. 438, 452 (1929). In other words, the original Article III cases seem to be premised on concepts akin to the "bitter with the sweet" theory of procedural due process and the "right/privilege" distinction. See Arnett v. Kennedy, 416 U.S. 134 (1974); Bailey v. Richardson, 182 F.2d 46 (1950), aff'd, 341 U.S. 918 (1951). That is, the Government could condition suit against itself on the plaintiff's waiver of any right to choose a forum or a jury trial, and in connection with exercising plenary grants of authority or limiting financial benefits, the political branches were fully free to dispose of government-created entitlements without providing any means of contesting such summary action.

Of course, as a due process matter, subsequent case law has undermined these conceptual underpinnings. It is now clear that there is a property interest in Government entitlements, a substantive due process right against arbitrary or capricious government

the Due Process Clause. Northern Pipeline, 458 U.S. at 68, citing Crowell v. Benson, 285 U.S. 22 (1932) (Crowell). In short, the dividing line that has emerged from the Court's precedent is that cases which are "inherently . . . judicial" (Ex parte Bakelite Corp., 279 U.S. 438, 458 (1929)) because they involve traditional rights governing "the liability of one individual to another" (Crowell, supra, 285 U.S. at 51) may not be removed from adjudication in the federal courts absent extraordinary circumstances, while those involving disputes "between the government and others" may permissibly be committed to agency adjudication. Ex parte Bakelite Corp., supra, 279 U.S. at 451. While the Court has not comprehensively or even consistently defined this concededly abstract line of demarcation, it has identified the factors which tend to differentiate public from private rights.

Probably the most important factor in defining the nature of the federal right presented is the historical underpinnings of the right. If the claim at issue is analogous to "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789", there is at least a strong presumption that it must be resolved by an Article III court. Northern Pipeline, supra, 458 U.S. at 90 (Rehnquist, J., concurring). While the Northern Pipeline plurality and some earlier cases seem to hold that Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty," (Northern Pipeline, supra, 458 U.S. at 67, quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S.

---

[5] (Cont.) practices, and a prohibition against conditioning the extension of Government benefits on the waiver of constitutional rights. See, e.g., Goldberg v. Kelly, 397 U.S. 254 (1970); Cleveland Board of Education v. Loudermill, 105 S. Ct. 1487 (1985); Speiser v. Randall, 357 U.S. 513 (1958). Nevertheless, for Article III purposes, we believe these concepts help to describe what is meant by matters which "could be conclusively determined" by the executive and legislative branches. The notion is that traditional, private state law claims antedating the newly created federal statutory rights are the type that should remain within the province of Article III courts. These rights do not exist solely by virtue of the federal statutory scheme, do not involve disputes between a private individual and the Government qua Government, and do not concern alleged deprivations caused by the Government's administration of its own regulatory or financial assistance schemes. Accordingly, even under a "consent to suit" or "bitter with the sweet" theory, such matters would not be subject to summary disposition by the political branches because they involve traditional disputes solely between private individuals and would thus fall outside the rationale supporting the earlier Article III cases. Again, the rise of modern due process theory should not affect the Article III analysis. The fact that recent due process cases create checks against the Government's power to engage in summary disposition of certain matters does not provide a rationale supporting the non-Article III adjudication of matters not

(18 How.) 272 (1856)), the Court's recent decisions seemingly conclude that the traditional common law attributes of a claim do not, standing alone, prohibit such a withdrawal. Nevertheless, even these recent decisions have emphasized that such traditional legal and equitable causes of action are at the "protected core" of Article III judicial powers. Thomas v. Union Carbide Agricultural Products Co., 105 S. Ct. 3325, 3336 (1985) (Thomas). See also Schor, supra, 106 S. Ct. at 3259. As the Court put it in Schor, "the state law character of a claim is significant for purposes of determining the effect that an initial adjudication of those claims by a non-Article III tribunal will have on the separation of powers for the simple reason that private, common law rights were historically the types of matters subject to resolution by Article III courts." Id. at 3259.[6]

Accordingly, if Congress creates a statutory cause of action, the roots of which can fairly be traced to a traditional legal or equitable claim, there is a heavy, albeit rebuttable, presumption that the claim may not be delegated to administrative adjudication.[7]

Conversely, "matters arising 'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments,' [and] matters that historically could have been determined exclusively by those departments" are clearly public rights. Northern Pipeline, supra, 458 U.S. at 67-68, quoting Crowell, supra, 285 U.S. at 50. See also Schor, supra, 106 S. Ct.

---

[5] (Cont.) previously subject to summary disposition.

[6] The Court has emphasized that the historical antecedents of a particular right, not an objective evaluation of whether it is of the sort that should be resolved by the judiciary, are paramount in public rights analysis. As the plurality noted in Northern Pipeline, "Doubtless it could be argued that the need for independent judicial determination is greatest in cases arising between the Government and an individual. But the rationale for the public-rights line of cases lies not in political theory, but rather in Congress' and this Court's understanding of what power was reserved to the Judiciary by the Constitution as a matter of historical fact." Id. at 68 n.20, cited in Schor, supra, 106 S. Ct. at 3259.

[7] The public rights analysis obtains with respect to "new" rights created by congressional statutes, as well as to non-Article III adjudication of common law claims not embodied in a congressional statute. See Curtis v. Loether, 415 U.S. 189, 193 (1974) ("We have considered the applicability of the constitutional right to jury trial in actions enforcing statutory rights 'as a matter too obvious to be doubted.'"); Pernell v. Southall Realty, 416 U.S. 363, 375 (1974); Tull, supra, slip op. at 8. Indeed, a contrary conclusion would make nonsense of the Court's emphasis on the historical lineage of the right and would essentially eviscerate the protection of Article III and the Seventh Amendment, since Congress al-

at 3259 ("when Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers is less than when private rights, which are normally within the purview of the judiciary, are relegated as an initial matter to administrative adjudication"); Thomas, supra, 105 S. Ct. at 3337; Ex parte Bakelite Corp., supra, 279 U.S. at 458; Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909). The Court has thus concluded that disputes involving newly created rights unknown to the common-law and/or matters that, as an historical matter, "could be conclusively determined by the Executive and Legislative Branches" may be adjudicated by non-Article III forums. Thomas, 105 S. Ct. at 3337, quoting Northern Pipeline, 458 U.S. at 68. In such circumstances, the dispute is not over the scope of the federal statutory duty X owes to Y, but the scope of the Government's authority in administering its own programs; it is thus a dispute between the Government and others. Accordingly, the Court has looked to whether the rights asserted are derived from a comprehensive regulatory scheme concerning a specialized area, such as federal broadcast licenses and "entitlements" to federal welfare benefits. See, e.g., Schor, 106 S. Ct. at 3258; Thomas, 105 S. Ct. at 3343 (Brennan, J., concurring).

It is more difficult to discern whether public rights are created by virtue of the Government's participation in matters not committed to its exclusive and all-encompassing regulatory discretion. Specifically, it is unclear what significance should be attached to the mere fact of Government participation in a representative or prosecutorial capacity, rather than in its capacity as administrator of its own regulatory programs.

The Court has recently established that neither the presence nor the absence of the Government as a party of record is dispositive in resolving whether a particular right is public or private.[8] Rather, one must "loo[k] beyond form to the substance of

---

[7] (Cont.) ways makes law by embodying "new" rights in a statute.

[8] In Northern Pipeline, the plurality stated:

> It is thus clear that the presence of the United States as a proper party to the proceeding is a necessary but not sufficient means of distinguishing 'private rights' from 'public rights.'

Id. at 69 n.23. Only a few years later, however, a majority of the Court rejected this "bright-line test" as exalting form over substance, holding that the United States' party status was neither necessary nor sufficient in resolving the public rights question for purposes of Article III. Thomas, supra, 105 S. Ct. at 3336. In Thomas, the Court rejected both the view that "the right to an Article III forum is absolute unless the federal government is a

what [the statutory scheme] accomplishes" with due regard for "the origin of the right at issue [and] the concerns guiding the selection by Congress of a particular method for resolving disputes." Thomas, 105 S. Ct. at 3337, 3336.

For this reason, as we previously stated with respect to another proposed amendment to the Fair Housing Act, the Government's participation is of little significance if it "simply has stepped into the individual's shoes in [the] administrative proceeding, and is suing in a representative capacity."[9] In this context, the Government simply acts as a prosecutor to vindicate the rights of one private individual against another, not to resolve a dispute between an individual and the Government qua Government; it is thus difficult to discern why the presence of the United States should convert such private disputes into "public" rights. Giving such talismanic effect to the Government's mere initiation of an administrative complaint would be inconsistent with Thomas' admonition that public rights analysis should not be a formalistic endeavor which focuses on the "identity of the parties alone" without "regard to the origin of the right at issue." Id. at 3337, 3336. As one commentator has noted, any such understanding of the Court's Article III precedent does indeed result in "[f]orm replac[ing] substance: Congress could avoid conferring jurisdiction upon an Article III court simply by altering the party structure in its new action, by replacing the private plaintiff with a government prosecutor."[10] L. Tribe, American Constitutional Law, at 43.

---

[8] (Cont.) party of record" and the contrary view that "Article III has no force simply because a dispute is between the Government and an individual." Id.

[9] Memorandum for William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, from Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel, Feb. 8, 1985, at 8 (discussing S. 1220, Mathias-Kennedy bill).

[10] As we stated with regard to a 1978 proposal which would have authorized the Department of Housing and Urban Development to file administrative complaints:

> It could be argued that Congress should not be able, under the vague rubric of "public right," to circumvent the Seventh Amendment completely by creating a chain of administrative courts capable of giving traditional common-law remedies to private litigants seeking relief from wrongs (such as dignitary torts) traditionally regarded as private in character.

Memorandum for the Honorable Ruth T. Prokop, General Counsel, Department of Housing and Urban Development, from Larry A. Hammond, Deputy Assistant Attorney General, Office of Legal Counsel, January 25, 1978, at 8 (1978 Opinion).

Nevertheless, there are cases in which administrative schemes have provided incidental relief to private parties in the course of enforcing public policy. See Schor, supra; NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Block v. Hirsh, 256 U.S. 135 (1921). The relief available in Jones & Laughlin, however, was essentially equitable in nature (reinstatement and backpay), and only the NLRB could seek court enforcement of the order.[11] Moreover, although the Court often cites Block v. Hirsh, 256 U.S. 135 (1921), for the proposition that what would usually be viewed as a private right--a landlord/tenant dispute--can be a "public right,"[12] it does so without noting what the Block court itself recognized: the case arose during an extraordinary housing shortage in the District of Columbia caused by World War I, which had transformed housing from its normal status as a matter of private sector concern into a matter of grave public concern. "[C]ircumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law." Id. at 155. Thus Block did not involve a purely private right. "The [rent] commission did not simply step into the shoes of a judicial tribunal and afford all-purpose relief to complaining private parties." 1978 Opinion, at 6. As we stated in our 1978 memorandum, "it cannot be concluded, based on this rather limited evidence, that administrative proceedings initiated by a public agency but providing the full panoply of judicial relief to private parties are necessarily permitted under the Seventh Amendment." 1978 Opinion, at 5.

Further, the Court, principally in the Schor opinion, has considered two other factors in determining whether judicial resolution of particular disputes is constitutionally required. Although the Court's language admits of differing interpretations, we do not view these factors as interpretive aids in defining the public right but rather as exceptions to the public right doctrine. In other words, these factors identify the narrow circumstances in which non-Article III adjudication of arguably private rights may be permissible.

First, Schor establishes that the Court will attach great, if not dispositive, significance to whether the party asserting a constitutional deprivation has participated in the non-Article III proceeding on a purely voluntary basis and thus has effectively waived any right to complain. The complaining party in Schor had opted for the CFTC's administrative forum rather than state or federal courts with full knowledge that the regulatory scheme allowed the CFTC to exercise jurisdiction over all counterclaims, including those involving matters of state law; indeed, the complaining party then "expressly demanded that [the opposing party] proceed on its [state law] counterclaim in the [administrative]

---

[11] Id. (citing Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261 (1940)).

[12] See e.g., Thomas, 105 S. Ct. at 3337.

proceeding rather than before the District Court." 106 S. Ct. at 3257. While the Schor Court determined that Article III separation of powers limitations, unlike Seventh Amendment rights, cannot be "waived" by a private litigant, it nonetheless made clear that the purely voluntary nature of the proceedings severely minimized any Article III concerns that might otherwise have obtained. "[J]ust as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences." Id. at 3260. See also id. at 3256 (noting that "the absence of consent to an initial adjudication" was "a significant factor" in Northern Pipeline's condemnation of Article I bankruptcy courts.)[13]

Second, the Schor Court also seemed to permit administrative adjudication of private rights, at least where participation in the administrative process is voluntary, if those private claims are wholly ancillary to the public rights created by the federal regulatory scheme and if their resolution in the administrative process is necessary to enable resolution of the statutory public rights in that forum. The issue in Schor concerned a CFTC administrative process established to provide reparations to "disgruntled customers of professional commodity brokers seek[ing] redress for the brokers' violations of the Act or CFTC regulations." Id. at 3250. When Mr. Schor invoked this procedure, his broker counter-claimed, on state law grounds, for a debit balance which Mr. Schor alleged had resulted from the broker's violations of the Commodity Exchange Act that were at issue in the administrative proceeding. If resolution of such private state law counterclaims was not permitted in the administrative forum, administrative resolution of the public rights created by the CEA would never occur, as a practical matter, "for when the broker files suit to recover the debit balance, the customer will normally be compelled either by compulsory counterclaim rules or by the expense and inconvenience of litigating the same issues in two fora to forgo his reparations remedy and to litigate his claim in court." Id. at 3254.

Accordingly, Schor created an exception to the public rights doctrine, which permits resolution of private claims in otherwise valid administrative schemes where resolution of those private rights "is limited to that which is necessary to make the [scheme] workable" by resolving the public rights created by the regulatory scheme. Id. at 3260. As the Court put it, "absent the CFTC's exercise of that authority [over state law counterclaims], the purposes of the [administrative] reparations procedure would have been confounded." Id. at 3260. In context, then, Schor's departure from the public rights line of cases is clearly premised on

---

[13] The Court in Thomas described the chemical companies as "voluntary participants in the program," 105 S. Ct. at 3338, although the only element of choice seems to have been whether to engage in the manufacture of chemicals.

the voluntary and necessary aspects of the administrative tribunal's resolution of private rights.

Finally, and most generally, the Court has looked to the "concerns motivating the legislature" in choosing a non-Article III forum. Thomas, 105 S. Ct. at 3338. In this regard, the Court has attached significance to a showing that there is an "imperative necessity" for administrative procedures because of the specialized, complex nature of the subject matter and a demonstrated need for expedited adjudication. Murray's Lessee, supra, 59 U.S. (18 How.) at 282. See also Crowell, 285 U.S. at 46; Thomas, 105 S. Ct. at 3338; Schor, 106 S. Ct. at 3258. Cf. Palmore v. United States, 411 U.S. 389, 407-408 (1973). The rationale here is that strong "evidence of valid and specific legislative necessities" (Schor, 106 S. Ct. at 3260) can be accommodated without unduly disrupting separation of powers concerns because such exceptions are limited in scope and reveal that Congress' sole motivation was to solve a pressing emergency, not to avoid Article III adjudication for its own sake. See id. at 3260-3261; Thomas, 105 S. Ct. 3338-3339.

(2) Analysis

Application of these principles to the draft bill leads us to conclude that it is of doubtful constitutional validity. While S. 558, unlike the draft bill, provides that the Department of Housing and Urban Development (HUD) will act as the moving party in an administrative proceeding, we do not believe that this difference alone should substantially affect the constitutional inquiry.[14] We will analyze each of the proposed bills in turn.

---

[14] We do not believe that the use of administrative law judges to determine punitive damages may be upheld on the theory that the administrative proceeding is merely an adjunct to the district court.

The Supreme Court has upheld against Article III challenges the use of administrative agencies as factfinders in cases involving private rights "only as an adjunct to an Art. III court, analogizing the agency to a jury or a special master." Atlas Roofing, supra, 430 U.S. at 450 n.7. However, we do not believe that these cases uphold the use of adjuncts in cases involving private rights that are also actions at common law. As originated in Crowell, the adjunct theory did not include private rights of action found at common law. Crowell involved a case arising in admiralty and the Court distinguished this from common law actions. "In cases of equity and admiralty, it is historic practice to call to the assistance of courts" non-judicial factfinders. Id. at 51. However, "on the common law side of the Federal courts, the aid of juries is not only deemed appropriate but is required by the Constitution itself." Id. Thus, the Court recognized that juries -- not non-judicial factfinders -- were required in cases involving common law questions. Crowell's language certainly supports an argument that the Seventh Amendment prevents Congress from placing actions

Perhaps the most important consideration in assessing the draft bill's proposed administrative proceeding is that the right adjudicated is derived from a common law action that is historically within the exclusive preserve of Article III courts. In Curtis v. Loether, 415 U.S. 189, 195-196 (1974), the Court concluded:

> We think it is clear that a damages action under § 812 [of the Fair Housing Act] is an action to enforce "legal rights" within the meaning of our Seventh Amendment decisions. [citations omitted]. A damages action under the statute sounds basically in tort -- the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach. As the Court of Appeals noted, this cause of action is analogous to a number of tort actions recognized at common law. More important, the relief sought here -- actual and punitive damages -- is the traditional form of relief offered in the courts of law.

Thus, the statutory right to be adjudicated in the draft bill's administrative proceeding is directly analogous to a cause of action that was subject to judicial resolution at the time the Constitution came into being, thus creating a strong presumption that it must be tried in an Article III court pursuant to normal procedures. See supra, at 2-3. Moreover, the Civil Rights Division draft bill provides that actual and punitive damages may be awarded in the arbitration hearing. Section 813. As indicated earlier, these are classic "legal" remedies of the type that could be award-

---

[14] (Cont.) that are both private and based on common law actions beyond the reach of a jury trial. Crowell reads the Seventh Amendment as requiring a jury in cases arising under the common law, id. at 51, while permitting agencies to act as de facto juries for private rights arising in equity or admiralty. Id. See also Northern Pipeline, 458 U.S. at 81-82 ("Crowell does not support the further proposition necessary to appellants' argument -- that Congress possesses the same degree of discretion in assigning traditionally judicial power to adjuncts engaged in the adjudication of rights not created by Congress.") (emphasis in original); United States v. Raddatz, 447 U.S. 667 (1980). We are especially reluctant to adopt this adjunct theory in the Seventh Amendment context when to do so would permit Congress to take from the courts a factfinding function that courts do not have in common law actions under the Seventh Amendment. See Tull, supra. Unlike the action at issue in Raddatz, the right being resolved under the draft bill is not one a court could decide if it wished -- the right to punitive damages has to be resolved by a jury. The adjunct theory, if applied to private rights based on common law actions would render the Seventh Amendment's protection hollow, dependent entirely upon

ed only by a court of law with a jury, not by a court of equity. See Tull, slip op. at 9 n.7. Cf. Atlas Roofing, 442 U.S. at 459, 460 (Seventh Amendment is intended to "preserve" the right to a jury trial in common law suits, not to require them where none was previously required.).

Further, wholly apart from its historical roots, the right at issue here is private in nature, in that it is intended to determine the liability of one individual to another. Crowell, supra, 285 U.S. at 51. Under the Civil Rights Division draft bill, virtually the only role played by the Government is to provide a federal rule of decision which defines the liability between private actors. Under the proposed bill, only private litigants may initiate the administrative proceeding and they may themselves seek review or enforcement of the arbitrator's order in court. Section 813(a)(1), (c). While HUD may prevent formal arbitration by not issuing a "reasonable cause" determination and may intervene in the hearing, the entire matter may well proceed to final judgment without Government participation, and, in any event, HUD's intervenor role would clearly be limited to vindicating the rights of the private litigant. In this regard, we note as well that civil rights statutes generally are intended to create personal rights, guaranteed to the individual. See generally Connecticut v. Teal, 457 U.S. 446 (1982); University of California Regents v. Bakke, 438 U.S. 265, 299 (1978) (opinion of Powell, J.); Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 708, 709 (1978); Shelly v. Kraemer, 334 U.S. 1, 22 (1948). In short, because the statutorily created right here derives from a dignatary tort and is enforceable primarily by private individuals for their own benefit pursuant to common law remedies, the Court's precedents strongly indicate that these administrative hearings will be viewed as "wholly private tort . . . cases [that] are not at all implicated" by the public right exception described in Atlas Roofing. Atlas Roofing, supra, 430 U.S. at 458.

Moreover, none of the other factors on which the Court has focused militate in favor of the draft bill's validity. It is clear that a defendant would be an involuntary participant in the arbitration proceedings, and it seems quite doubtful that the private housing market in the United States would generally be considered a "specialized area" for administrative regulation by the federal government. Further, the exception created in Schor for ancillary and necessary private claims is inapplicable since adjudication of common law claims is clearly not "incidental to, and completely dependent upon, adjudication of[15] . . . claims created by federal law." Schor, 106 S. Ct. at 3260.

---

[14] (Cont.) the whim of a congressional majority.

[15] We note that the Civil Rights Division's draft bill, as well as S. 558, provide for court enforcement of the adminstrator's award. Draft bill, sec. 813(d), (g); S. 558, sec. 812(h), (i). We confess that we are not sure whether this is an argument in favor of or

We further note that the Fair Housing Act certainly does not seem to involve the imperative necessity that the Court recognized in Thomas as a legitimate motivating factor for Congress' consideration in choosing an arguably prompter administrative remedy. Id. at 3338. Indeed, the Loether Court rejected similar arguments advocating the need for expedited judicial review of Title VIII actions without a jury trial. Noting the availability of preliminary injunctions and non-jury trials in cases seeking only equitable relief, the Court stated "[m]ore fundamentally, however, these considerations are insufficient to overcome the clear command of the Seventh Amendment." 415 U.S. at 198. It is nonetheless conceivable that a strong legislative record demonstrating that administrative trials are for some reason necessary to resolve meaningfully Fair Housing cases would tend to support the validity of the congressional purpose in opting for these proceedings. Of course, any such claim is substantially undermined by the fact that judicial proceedings remain available to plaintiffs so inclined, thus undercutting any notion that administrative proceedings are "necessary."

---

15 (Cont.) against the proposed bill's constitutional validity since the Court's precedent points in opposite directions. Under the adjunct theory of Article III, assignment of some limited functions to a non-Article III tribunal is sometimes permissible, so long as "'the essential attributes' of judicial power are retained in the Art. III court." Northern Pipeline, 458 U.S. at 81. See also Crowell, 252 U.S. at 51. Thus, under the adjunct theory as traditionally understood, it was quite clear that the constitutional permissibility of the statutory scheme was enhanced if the non-Article III forum was given only quite limited "judicial" powers, such as the right to enforce its own orders. Quite naturally, therefore, Northern Pipeline, in contrasting Crowell, said that a major defect in the bankruptcy courts scheme was that these non-Article III tribunals could enforce their own orders without "seek[ing] enforcement of its . . . orders in the district court". Northern Pipeline, 458 U.S. at 85. See also id. at 91 (Rehnquist, J., concurring); Crowell, 258 U.S. at 51. In Schor, however, the Court stated that the Article III validity of the arbitration scheme was enhanced because it "relie[d] tangentially, if at all, on the Judicial Branch for enforcement" of the arbitrators' orders, a conclusion that seems directly at odds with Crowell, Northern Pipeline, and the entire rationale of the adjunct theory as previously understood. Id. at 33-38. Fortunately, we need not engage in the task of reconciling these cases, since we have previously concluded that the adjunct theory is probably inapposite here because the statutory right to be enforced is derived directly from a private, common law claim. See n. 14, supra. We note, parenthetically, that the powers assigned to the arbitrator under the draft bill and S. 558 are considerably greater than the power (i.e., assessment of value) assigned to the adjunct in Crowell, but less than the plenary powers given to the bankruptcy courts in Northern Pipeline. See 1985 Memorandum, at 11-13.

Indeed, in the circumstances presented here, the congressional purpose underlying the establishment of administrative proceedings may well be viewed as a substantial deficiency, since the draft bill's structure and background suggest that the sole purpose of the administrative alternative is simply to supplement or displace adjudication by Article III courts and juries. In this regard, it is significant that "there are only minimal differences between the relief available in the administrative forum (in which a civil penalty for the Government replaces punitive damages for the individual) and the judicial forum."[16] By providing for punitive damages in either the administrative or judicial forum, moreover, the draft bill leaves it entirely up to a plaintiff in an individual case to choose between the Article III and Article I forum, without sacrificing any weapon in his arsenal of remedies. Thus, the clear effect of the Act is to create parallel, virtually identical Article III and Article I processes; a dualism which serves no apparent purpose other than enhancing plaintiff's options and his ability to avoid bringing his case before a jury or an Article III judge.

We do not mean to suggest that providing plaintiffs with a choice between such parallel schemes by itself raises independent due process problems, even where, as here, it renders the defendant's right to a jury trial utterly dependent on the plaintiff's choice of fora.[17] However, the dual structure may well directly signal "the concerns guiding the selection by Congress of a particular method for resolving disputes." Thomas, 105 S. Ct. at 3336. In this regard, it is also noteworthy that "the Department would enter the fray, not at the outset, but nearly [19] years after the creation of a private cause of action in the district court which provides for identical remedies, and nearly [13] years after the Supreme Court expressly ruled that under such circumstances trial by jury must be available on demand." 1978 Opinion, at 7.

Against this backdrop, a reviewing court may fairly conclude that, in contrast to Schor, Congress' "primary focus was [not] on making effective a specific and limited federal regulatory scheme, [but] on allocating jurisdiction among federal tribunals." Schor, supra, 106 S. Ct. at 3260. In other words, the background and parallel structure of the Act might well strongly suggest that the "concerns that drove Congress to depart from the requirements of Article III," id. at 3258, were merely Congress' desire to depart from the requirements of Article III because of the cost and delay which attend a jury trial in a federal court. While the speed and efficiency of Article I tribunals are virtues, we believe that speed and efficiency alone cannot be viewed as sufficient reason for establishing Article I adjudication absent "imperative necessity." Indeed, acceptance of such a justification would lead to the somewhat circular rule that Congress may avoid the constraints of

---

[16] 1985 Opinion, at 8.

[17] Id. at 20-22.

Article III and eliminate the Seventh Amendment rights ringingly endorsed in Tull solely on the ground that it believes that Article III adjudication is more cumbersome than alternative dispute resolution without judges and juries.

We turn next to consideration of S. 558 which is identical to the draft bill in all material respects save one: it provides that only HUD may institute administrative proceedings "on behalf of the aggrieved person filing the complaint" of housing discrimination, rather than the aggrieved person himself. S. 558, section 810(g)(2)(A). Significantly, the private complainant has a right to file a complaint with the Secretary or to intervene as a full party in an administrative proceeding initiated by HUD, and he apparently may obtain both judicial enforcement and review of an adverse decision even if the Secretary does not go forward. Id., sections 810(a), 812(h)(2). While, for the reasons noted above, the issue is hardly free from doubt, we think that the better view is that the Secretary's participation in initiating the complaint is not alone sufficient to obviate the constitutional difficulties previously described.

As we have suggested, HUD's participation as a party in these circumstances says very little about the "public" nature of the right involved, but simply describes the parties that are authorized to enforce that right. For this reason, the better understanding of the Court's precedent is that the Government's party status should not be given dispositive weight, particularly where, as here, the Government does not possess exclusive enforcement authority.

We are fortified in our conclusion by the fact that this Office has previously determined, albeit not without equivocation or difficulty, that a proposed 1978 amendment to the Fair Housing Act, virtually indistinguishable from S. 558, was probably unconstitutional. We so concluded because, as with S. 558, HUD "would not be the sole enforcer of the statutorily created" government policy and would not be acting in a regulatory capacity with regard to a public right.[18]

Our 1985 Memorandum points to a similar conclusion. There we concluded, albeit tentatively, that a proposed amendment would probably survive constitutional scrutiny, but we did so in large part because the administrative process failed to "provide the aggrieved individual the punitive damages typically available at common law."[19] As noted, S. 558, like the draft bill, does pro-

---

[18] 1978 Opinion, at 7. Although acknowledging the difficulty of the issue, we concluded, "were we to opine one way or the other our conclusion would probably favor finding that [the proposal] is unconstitutional." Id. at 8.

[19] 1985 Memorandum, at 9.

vide this traditional legal remedy, thus substantially reinforcing the private, common law nature of the cause of action and rendering the administrative hearing virtually identical to a judicial proceeding.

It should be noted, however, that Thomas and Schor, two subsequent decisions of the Supreme Court have evinced less sympathy for constitutional challenges to administrative proceedings and upheld statutes which share some, though clearly not all, of the defects described above. Nevertheless, for the reasons that we have previously indicated, a review of the Thomas and Schor opinions persuades us that they contain nothing which requires an analysis or conclusion different from those expressed in our prior memoranda. First, with respect to the specific question of the Government's party status, Thomas reinforces the correctness of our previous determination that such party status means little unless it affects the "substance of what [the statute] accomplishes." Thomas, 105 S. Ct. at 3337. Second, Schor's arguable departure from prior cases is not of controlling importance here because the proposed bills contemplate the involuntary participation of the defendant in administrative hearings and do not adjudicate private rights in order to preserve the agency's practical ability to adjudicate public rights.

Finally, we discern nothing in Thomas which either signals any sort of wholesale retreat from the Court's Article III jurisprudence or lends meaningful support to the proposed bills. Thomas simply upheld the administrative implementation of a comprehensive federal regulatory scheme in an opinion joined by every member of the Northern Pipeline plurality that reached the merits of the case. See Thomas, 105 S. Ct. at 3340 (Brennan, J., concurring). At issue in Thomas was administrative resolution of a very mechanical and straightforward dispute over the amount of compensation owed for access to privileged data, a dispute that nonetheless needed to be resolved expeditiously if the administrative scheme was to accomplish its purpose. As the Court noted, "Congress, without implicating Article III, could have authorized EPA to charge follow-on registrants fees" and that such "rate-making is an essentially legislative function." Id. at 3338 (emphasis added). Thus, the charging of such fees was a matter that "could be conclusively determined by the Executive and Legislative Branches." Id. at 3337, quoting Northern Pipeline, 458 U.S. at 68. Conversely, the Court placed heavy reliance on the fact that the statute at issue did not "displac[e] a traditional cause of action [or] affec[t] a pre-existing relationship based on a common-law [claim]" because "the statutory right to compensation does not depend on or replace the right to such compensation under state law." Id. at 3336, 3335. In short, Thomas broke no new Article III ground because "at its heart the dispute involve[d] the exercise of authority by a federal government arbitrator in the course of administration of [the statute's] comprehensive regulatory scheme. As such it partakes of the characteristics of a standard agency adjudication." Id. at 3343 (Brennan, J., concurring).

78-076 O - 88 - 26

Having said all that, we emphasize that, due to the meandering and confusing course of the Court's precedent, it is both impossible to offer any determinative opinion in this area and possible to construct a defense of the proposed bills which may prevail in some courts. A line of defense which might be accepted by a sympathetic court would proceed along the following lines. First, elimination of racial and ethnic discrimination in housing is a paramount public purpose. Further, Congress has great discretion in choosing the manner in which to resolve disputes, so long as the subject matter of the dispute concerns an area over which Congress permissibly exercises authority, including any area it may reach pursuant to the Commerce Clause. See Atlas Roofing Co., 430 U.S. at 456-457; Northern Pipeline, 458 U.S. at 105-113 and cases discussed therein (White, J., dissenting). Moreover, under a highly formalistic approach, a court could conclude that the common law antecedents of section 812 of the Fair Housing Act are unimportant because Congress created a "new" statutory duty when it outlawed housing discrimination, and that the presence of the United States, at least as the moving party under S. 558, is of great significance. The Court could further determine that housing discrimination is a "specialized area" requiring administrative expertise and that it should defer to Congress' determination that there is a tangible need for expedited review. More generally, a court could fairly note that differentiating between public and private rights and/or the regulatory and prosecutorial role of the government is a highly abstract endeavor which has not received, and is not susceptible to, principled or consistent resolution.

We acknowledge that there is language in some of the Court's cases which can be interpreted to support such a line of analysis. This sort of analysis would place virtually no limits on congressional authority to remove the resolution of disputes entirely from Article III courts. Congress always creates "new" rights by enacting statutes; these statutes must always be directed at an area which Congress has the power to regulate, and administrative tribunals are always more expeditious and convenient than juries and judges. Indeed, such an analysis comes perilously close to subordinating Article III's reservation of the "judicial Power" and the express guarantees of the Seventh Amendment to the Necessary and

Proper Clause.[20] Accordingly, we believe the draft bill and S. 558 in their current form are and would likely be declared unconstitutional on Article III and Seventh Amendment grounds.

II. Conclusion

While the policy implications of any modification to the draft bill are obviously for you to resolve, we recommend certain changes in order to enhance the constitutional viability of the draft bill. All concerns under the Seventh Amendment and Article III would be alleviated, of course, by deletion of the provisions establishing an administrative hearing process. Short of this, the best solution from a constitutional perspective would be to limit the relief available in an administrative proceeding to equitable remedies such as injunctions and restitution, thus avoiding any conflict with the Seventh Amendment's preservation of jury trials in "suits at Common Law." At a minimum, serious consideration shcould be given to eliminating at least punitive damages for private litigants in the arbitration proceedings. The retention of compensatory damages alone might be upheld under reasoning similar to that outlined in our 1985 Memorandum.

Please let me know if we can be of further assistance.

Charles J. Cooper
Assistant Attorney General
Office of Legal Counsel

---

[20] Nor do we understand why the grave importance of a public policy is an argument supporting removal of that controversy from an impartial judiciary insulated from political influence.

U.S. Department of Justice
Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

FEB 8 1984

MEMORANDUM FOR WILLIAM BRADFORD REYNOLDS
Assistant Attorney General
Civil Rights Division

Re: Whether a Jury Trial is Required in Enforcement Proceedings Under S. 1220

In response to your request of October 4, 1983, we have reviewed the draft memorandum by your Division discussing whether Congress, without offending the jury trial requirement of the Seventh Amendment, may provide for an administrative adjudication and award of damages to an individual to remedy violations of Title VIII of the Civil Rights Act of 1968, 82 Stat. 88, 42 U.S.C. § 3601 et seq. (Fair Housing Act). Although we find the issue extremely difficult, we are inclined to believe that Congress may, consistent with the Constitution, assign adjudication of fair housing violations to an administrative agency absent a jury trial, even though Congress has provided that the same violations may alternatively be remedied by civil actions in which a jury trial is constitutionally required. See Curtis v. Loether, 415 U.S. 189 (1974). However, because we are troubled by a congressional enforcement scheme that enables an aggrieved person to obtain substantially similar relief in administrative or court proceedings, yet conditions the jury trial right of the defendant on the forum choice of other parties to the proceeding, we set forth our reasoning in detail below.

I. Background

S. 1220, the Mathias-Kennedy bill to amend Title VIII of the Civil Rights Act of 1968, contains a complex enforcement scheme with two primary enforcement options: administrative proceedings and private civil actions. Section 810(a)(1) provides that the Secretary shall make an investigation "[w]henever an aggrieved person, or the Secretary on the Secretary's own initiative, files a charge alleging a discriminatory housing practice . . . ." If, after such an investigation, the Secretary determines that reasonable cause exists

to believe the charge is true, the Secretary shall, on behalf of the aggrieved person filing the charge, either file an administrative complaint under § 811 or refer the matter to the Attorney General for the filing of an appropriate civil action under § 813(b). See § 810(c)(1). 1/

Section 811 provides for an administrative hearing on the record, which may result in an administrative order "providing for such relief as may be appropriate (including compensation for all damages suffered by the aggrieved person as a result of the discriminatory housing practice), and . . . a civil penalty of not to exceed $10,000." § 811(a). The order of the administrative law judge is subject to review on appeal by an appeals panel of the Fair Housing Review Commission. See §§ 808(c); 811(a). A final order may be appealed within sixty days to the appropriate court of appeals. See § 811(b). Judicial review is conducted pursuant to the general provisions governing the review of orders of federal agencies, see 28 U.S.C. § 2341 et seq.; findings of fact are conclusive if supported by substantial evidence in the record as a whole. The Attorney General is authorized to bring a civil action in district court to enforce any final order that is referred for enforcement by the Secretary, or to collect any civil penalty assessed by the administrative law judge under § 811(d)(1) for violation of a final order. See § 813(b).

Alternatively, § 812(a)(1) authorizes a private aggrieved individual to commence a civil action in an appropriate federal or state court. In such actions, the court shall award such relief as may be appropriate, including "money damages, equitable and declaratory relief, and, punitive damages." § 812(c). This relief is similarly authorized for civil actions brought by the Attorney General under § 813.

If the Secretary has commenced an administrative hearing with respect to a charge made by an individual to the Secretary, that individual may not commence a private civil action. See § 812(a)(3). In parallel fashion, if an aggrieved individual has commenced a trial on the merits in a civil action, the Secretary may not commence administrative "proceedings toward

---

1/ The Secretary must refer to the Attorney General any "charges involving the legality or validity of any State or local zoning, or other land use law or ordinance, or any novel issue of law or fact or other complicating factor." § 810(c)(2).

the issuance of a remedial order based on such charge." § 812(a)(2). 2/

This scheme of mutually exclusive administrative and judicial enforcement options has an anomalous effect on a party's right to a jury trial. On the one hand, no jury trial is available in the administrative proceedings. On the other hand, the Supreme Court has held that the Seventh Amendment entitles either party to demand a jury trial in an action for damages in the federal courts under current § 812 of the Civil Rights Act of 1968, which, similar to proposed § 812(a)(1), authorizes private plaintiffs to bring civil actions to redress violations of the fair housing provisions of the Act. See Curtis v. Loether, 415 U.S. 189 (1974). Consequently, although a defendant would be entitled to a jury if a plaintiff proceeds in federal court, the same defendant would have no right to a jury trial if an aggrieved person files a complaint with the Secretary and the Secretary subsequently files an administrative complaint. 3/

We believe that in order to resolve the constitutionality of this multiple enforcement scheme we must address the following questions:

1. Can Congress constitutionally vest adjudication of housing discrimination claims in an administrative tribunal, in which there would be no right to a jury trial?

2/ The Secretary may also investigate housing practices on his or her own initiative to determine whether charges should be brought. See § 810(a)(1). The bill does not specify the forum in which such charges would be brought. We assume that it was intended that such charges might proceed administratively, although § 810(c)(1)(A) suggests that the administrative forum is limited solely to charges filed on behalf of aggrieved persons who previously have filed charges with the Secretary.

3/ The reasoning of Curtis v. Loether, 415 U.S. 189 (1974), might also apply if the Secretary refers the matter to the Attorney General and the Attorney General brings a civil action in federal court under § 813. Accordingly, a defendant's right to a jury trial might also be affected by the Secretary's determination either to proceed administratively or to refer the matter to the Attorney General for judicial proceedings. However, because the Supreme Court has never determined whether the Seventh Amendment has any application to Government litigation, see Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 449-50 n.6 (1977), we decline to reach this issue.

2. Given that a defendant would be constitutionally entitled to a jury trial in a damages action brought in federal court under the Fair Housing Act, can Congress simultaneously provide for an essentially similar action before an administrative tribunal, in which there would be no right to a jury trial, without violating the defendant's Seventh Amendment right?

3. Assuming there are no Seventh Amendment concerns, does the statutory scheme nevertheless violate due process insofar as the defendant landlord's jury trial right is in large part contingent on the procedural choices of other parties in the proceedings?

ANALYSIS

1. Can Congress constitutionally vest adjudication of housing discrimination claims in an administrative tribunal, in which there would be no right to a jury trial?

Before determining whether administrative adjudication of Fair Housing Act violations would offend an individual's Seventh Amendment right, a threshold question is whether administrative adjudication of the rights created by the Fair Housing Act comports with Article III of the Constitution. If Congress cannot constitutionally vest adjudication of certain housing discrimination claims in a non-Article III tribunal, then we need not reach the narrower Seventh Amendment issue.

Article III of the Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

U.S. Const. art. III, § 1. "Judges, both of the supreme and inferior Courts," enjoy tenure "during good Behaviour," and receive salaries not subject to diminution during their term of office. Id. There is no question that S. 1220 does not extend the Article III protections of life tenure and undiminished salary to the administrative law judges who would hear complaints filed by the Secretary under § 811. We therefore first examine whether Congress may commit adjudication of housing discrimination complaints brought by the Secretary on behalf of an individual, who may obtain relief in the form of compensatory damages, to officers not enjoying life tenure and irreducible compensation.

In creating statutory rights, Congress has considerable discretion to define in what manner and forum such rights may be vindicated. See Crowell v. Benson, 285 U.S. 22, 50-51 (1932); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856). Unfortunately, Supreme Court decisions defining the scope of Congress's discretion to vest federal judicial power in non-Article III tribunals involve one of the most confusing and controversial areas of constitutional law, Glidden Co. v. Zdanok, 370 U.S. 530, 534 (1962) (Harlan, J.) (plurality opinion), and "do not admit of easy synthesis." Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 91 (1982) (Rehnquist, J., concurring in judgment). In particular, the Court's latest Article III pronouncement in Northern Pipeline, which concluded that the broad grant of jurisdiction to non-Article III bankruptcy courts was incompatible with the Constitution, was designed but failed to establish a unitary or comprehensive Article III jurisprudence. Northern Pipeline raised the question whether a non-Article III bankruptcy court could adjudicate a common law contract claim, brought by a company undergoing Chapter 11 reorganization against its purported debtor. Six Justices agreed that Article III prohibits a non-Article III federal tribunal from adjudicating state common law claims over the objection of a party. Northern Pipeline, 458 U.S. at 87 (plurality opinion of Brennan, J.); id. at 91 (Rehnquist, J. concurring in judgment). Because only four members of the Court joined in Justice Brennan's elaboration of Article III principles, we must explore the current problem not only in light of the plurality opinion but also with regard to the views of the concurring Justices.

The plurality opinion in Northern Pipeline examined two theories pursuant to which Congress may vest judicial power in non-Article III tribunals: the "legislative court" exception and the Article III court "adjunct" theory. According to the plurality, Congress may vest judicial power in legislative courts in "three narrow situations," all of which involve exceptional grants of power to the Executive and Legislative Branches. Northern Pipeline, 458 U.S. at 64. These legislative court exceptions include "territorial courts," see American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828), "courts-martial," see Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857), and cases involving "public rights." Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856). The plurality's "adjunct" theory was based on the recognition "that Article III does not require 'all determinations of fact [to] be made by judges.'" Crowell v. Benson, 285 U.S. at 51, quoted in Northern Pipeline, 458 U.S. at 81. "[W]ith respect to congressionally created rights some

factual determinations may be made by a specialized factfinding tribunal designed by Congress, without constitutional bar." Id. But the functions of the adjunct must be limited so that "the essential attributes" of judicial power are retained in an Article III court. Id.

The adjudicatory scheme for housing discrimination claims created by S. 1220 clearly does not fall within the legislative court exception for territorial courts or courts-martial. However, a persuasive argument can be made that S. 1220 creates a "public right" in establishing a duty not to discriminate in the provision of housing. The "public rights" doctrine was initially articulated in Murray's Lessee v. Hoboken Land & Improvement Co.:

> [W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.

59 U.S. at 284. That is, because Congress constitutionally may commit to nonjudicial executive determination matters that arise between the Government and its citizens "in connection with the performance of the constitutional functions of the executive or legislative departments," Crowell v. Benson, 285 U.S. at 50, Congress is equally free to commit the determination of such matters to legislative courts or administrative agencies. Matters that fall within the public rights doctrine may involve the entire range of Congress's Article I powers. "Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans." Crowell v. Benson, 285 U.S. at 51; see Atlas Roofing Co. v. Occupational

Safety and Health Review Comm'n, 430 U.S. 442, 456-57 (1977); Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909). 4/

The difficulty, as the Supreme Court has conceded, is that "[t]he distinction between public rights and private rights has not been definitively explained in [the Court's] precedents." Northern Pipeline, 458 U.S. at 69. A threshold definition of public rights is that they arise "between the government and others." Ex parte Rakelite Corp., 279 U.S. 438, 451 (1929). Private rights, in contrast, involve "the liability of one individual to another under the law as defined." Crowell v. Benson, 285 U.S. at 51. Moreover, "the presence of the United States as a proper party to the proceeding is a necessary but not sufficient means of distinguishing 'private rights' from 'public rights.'" Northern Pipeline, 458 U.S. at 69 n.23.

In the administrative scheme established by S. 1220, the Secretary files a complaint "on behalf of the aggrieved person." § 810(c)(1)(A). The aggrieved person has the right to intervene in the proceedings. § 811(a). Although the administrative official has discretion to provide compensatory damages relief for the aggrieved person, the bill does not authorize the administrative award of punitive damages (which are available in individual court actions brought under § 812). Further, a civil penalty not to exceed $10,000 is available to the Government. In these latter two respects -- the exclusion, in the administrative proceeding, of punitive damages for the individual and the availability of a civil penalty for the Government -- the Mathias-Kennedy bill differs from an earlier housing discrimination bill that this Office concluded was constitutionally vulnerable. See Memorandum for the Hon. Ruth T. Prokop, General Counsel, Department of Housing and Urban Development, re: Constitutionality of Section 810 of H.R. 3504 (The Edwards-Drinan Bill), from Larry A. Hammond, Deputy Assistant Attorney General, Office of Legal Counsel (Jan. 25, 1978). The earlier bill authorized administrative officials to award punitive damages to individuals and did not provide for a civil penalty for the Government.

4/ The Court has refused to limit Congress's discretion to create public rights and to establish legislative tribunals in which to adjudicate them to particular Article I grants of power that might be deemed "inherently in the exclusive domain on the Federal Government and critical to its very existence -- the power over immigration, the importation of goods, and taxation." Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 456 (1977).

We believe it is close question whether the Government simply has stepped into the individual's shoes in this administrative proceeding, and is suing in a representative capacity, or whether S. 1220 in fact creates a public right that, consistent with Article III, may be adjudicated in an administrative tribunal. Cf. E.E.O.C. v. Corry Jamestown Corp., 719 F.2d 1219, 1225 (3d Cir. 1983) (EEOC has right to jury trial in court action under Age Discrimination in Employment Act in order to avoid "inequitable and anomalous result" of individual losing his Seventh Amendment right whenever EEOC sues on his behalf). This determination is complicated because S. 1220 concurrently provides for an essentially similar individual damages action in court, an action that resembles the current damages action under the Fair Housing Act. The Supreme Court has declared that existing actions under § 812 are actions "to enforce 'legal rights' within the meaning of our Seventh Amendment decisions," Curtis v. Loether, 415 U.S. at 195, and are "analogous to a number of tort actions recognized at common law." Id. Significantly, there are only minimal differences between the relief available in the administrative forum (in which a civil penalty for the Government replaces punitive damages for the individual) and the judicial forum.

Nevertheless, there are clearly precedents for administrative bodies both enforcing public policy and providing incidental relief, including monetary relief, to private citizens. As courts have recently noted in the context of administratively determined reparations awards under the Commodity Exchange Act, the fact that new statutory rights are enforceable in favor of a private party does not preclude administrative adjudication of such rights. Myron v. Hauser, 673 F.2d 994, 1005 (8th Cir. 1982); Rosenthal & Co. v. Bagley, 581 F.2d 1258, 1261 (7th Cir. 1978) (both citing Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. at 452-55). In NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), for example, the Court upheld an administrative award of both reinstatement and back pay for an employee. Somewhat similarly, in Block v. Hirsh, 256 U.S. 135 (1921), the Court rejected a constitutional challenge to a statute that temporarily suspended the legal remedy of ejectment and established an administrative tribunal to determine fair rents at which tenants might hold over notwithstanding the expiration of their leases. Just as the Northern Pipeline plurality distinguished between the restructuring of debtor-creditor relations, which "may well be a 'public right,'" 458 U.S. at 71, and the adjudication of state-created private rights, a distinction exists between the government-prosecuted administrative proceeding in S. 1220 and the individual damages action in federal court.

Unquestionably, the determination that S. 1220 creates a public right would be considerably simplified if no compensatory relief were available to the individual in the administrative proceeding. We believe, however, that the courts would conclude that insofar as S. 1220 creates a right (1) in an area of important public concern, cf. Bob Jones University v. United States, 103 S. Ct. 2017, 2029-30 (1983) (firm national policy against racial discrimination), (2) enforceable by the Government in an administrative action, (3) providing a civil penalty for the Government, and (4) failing to provide the aggrieved individual the punitive damages typically available at common law, 5/ it probably is to be characterized as a public right.

This determination is consistent with case law that has rejected Article III and Seventh Amendment challenges to the reparations procedure of the Commodity Exchange Act (Act), under which an individual may receive a damages award from an administrative tribunal. The 1974 Amendments to the Act established a reparations procedure, "analogous to the operation of a small claims court," S. Rep. 850, 95th Cong., 2d Sess. 16 (1978), in which a customer, often representing himself pro se, could obtain damages for claims against registered commodities brokers and certain other professionals for violations of the Act or any Commodity Futures Trading Commission (CFTC) regulations, rules or orders. 7 U.S.C. § 18 (1976 ed.); Myron v. Hauser, 673 F.2d at 1001; Rosenthal & Co. v. Bagley, 581 F.2d at 1259. Under the 1974 Amendments to the Act, an individual could file a complaint with the CFTC, which was authorized to investigate the complaint. 7 U.S.C. § 18(a), (b) (1976 ed.). If the CFTC determined that the "facts warranted such action," the CFTC notified the accused commodity professional and afforded a hearing before an administrative official. 7 U.S.C. § 18(b). 6/ Thus, although the CFTC provided a forum for

---

5/ See Richerson v. Jones, 551 F.2d 918, 926-28 (3d Cir. 1977) (punitive damages are traditional form of relief in courts of law; failure of Congress to insert express authorization for punitive damages under Title VII contrasted with express provision for punitive damages in court action under Title VIII).

6/ The 1983 amendments simplified the statutory procedural requirements but did not alter the administrative scheme in any significant manner. Section 18(a) now provides that any

(Footnote continued on next page)

resolution of these claims, it did not directly assume a prosecutorial role. Rather, complainants could retain private counsel or represent themselves before the administrative law judge. Myron v. Hauser, 673 F.2d at 1001.

The Baoley court summarily dismissed an Article III objection to this congressional scheme for administrative adjudication of reparations claims as "not even arguable." 581 F.2d at 1261. The court in Myron v. Hauser, however, explained why it did not think that purely private rights were involved in the administrative proceedings. Although conceding that "[t]he present case is not one 'in which the Government sues in its sovereign capacity to enforce public rights,'" the court nevertheless believed that the case "is one in which 'the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights.'" Myron v. Hauser, 673 F.2d at 1005 (emphasis added) (citations omitted). Because Congress, acting under the Commerce Clause, had regulated commodity options transactions, the court regarded the case "in a functional sense [as] one between the government and the commodity options broker, the party subject to government regulation." Id. Under S. 1220, Congress would not simply be regulating the nondiscriminatory provision of housing; the Government would also be prosecuting alleged violations of the Fair Housing Act in administrative proceedings. If the Myron court concluded that the Commodity Exchange Act created a public right that could be adjudicated in an administrative tribunal, even though the statute was enforceable by, and in favor of, private parties, then it certainly would conclude that S. 1220, which is enforceable by the Government, creates a public right, the benefits of which also redound in part to aggrieved individuals.

(Footnote continued)

person complaining of a violation of the Act by any registered person may "apply to the Commission for an order awarding actual damages proximately caused by such violation." 7 U.S.C. § 18(a). The 1983 amendments eliminated the specific provisions empowering the CFTC to investigate any complaint, and requiring the CFTC to forward the complaint, if warranted, to the respondent for an answer. The CFTC now has general discretion to "promulgate such rules, regulations, and orders as it deems necessary or appropriate for the efficient and expeditious administration of this section." 7 U.S.C. § 18(b).

Alternatively, the use of administrative tribunals to adjudicate the right to nondiscriminatory housing created by S. 1220 might be validated by the "adjunct" theory articulated by the plurality in Northern Pipeline. The plurality regarded Crowell v. Benson, 258 U.S. 22 (1932), and United States v. Raddatz, 447 U.S. 667 (1980), as establishing two principles that define the extent to which Congress may constitutionally vest judicial functions in non-Article III adjuncts. First, "when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated -- including the assignment to an adjunct of some functions historically performed by judges." Northern Pipeline, 458 U.S. at 80. Second, "the functions of the adjunct must be limited in such a way that 'the essential attributes' of judicial power are retained in the Art. III court." Northern Pipeline, 458 U.S. at 81. In Crowell, the Supreme Court upheld an administrative agency's power to make factual determinations concerning the nature and extent of employee injuries, pursuant to a federal statute requiring employers to compensate their employees for work-related injuries occurring upon the navigable waters of the United States. In United States v. Raddatz, the Court upheld the Federal Magistrates Act, which permits magistrates to adjudicate, subject to de novo review by the district court, certain pretrial motions involving constitutional claims. Because Crowell, similar to S. 1220, involves congressionally created rights (in distinction to common law or constitutional claims) with respect to which Congress possesses relatively broad discretion to assign factfinding to adjuncts, it is the relevant touchstone for the present analysis. 7/

In Crowell, the administrative agency performed an admittedly narrower function than would the agency under S. 1220. The federal statute at issue in Crowell provided for compensation of injured employees "irrespective of fault" and prescribed a fixed schedule of compensation. 285 U.S. at 38. In view of these limitations on the agency's functions and powers,

---

7/ The plurality in Northern Pipeline emphasized that Congress does not possess the same degree of discretion to assign "traditionally judicial power to adjuncts engaged in the adjudication of rights not created by Congress," 458 U.S. at 81-82, and noted that "Congress' assignment of adjunct functions under the Federal Magistrates Act [pursuant to which constitutional as opposed to solely congressionally-created rights could be adjudicated] was substantially narrower than under the statute challenged in Crowell." Id. at 82.

the Court found that the agency's determinations were "closely analogous to findings of the amount of damages that are made, according to familiar practice, by commissioners or assessors." Id. at 54. Although S. 1220 does not impose such narrow limitations on the housing discrimination agency's factfinding powers, neither does the bill create adjuncts with powers as broad as those possessed by the bankrutpcy courts at issue in Northern Pipeline. The Bankruptcy Act of 1978 vested judges of bankrutpcy courts with all the powers of a court of equity, law, and admiralty, including the power to preside over jury trials, to issue writs of habeas corpus, and to issue any order or judgment appropriate for the enforcement of the provisions of Title 11. Northern Pipeline, 458 U.S. at 85. 8/ In contrast, the administrative tribunal in S. 1220, similar to the agency in Crowell, lacks many of these powers, and specifically has no power to enforce its orders. Moreover, the subject matter jurisdiction of the agency under S. 1220 is limited to congressionally-created claims of housing discrimination, whereas the jurisdiction of the bankruptcy courts under the 1978 Bankruptcy Act encompassed not only traditional matters of bankruptcy, but also all civil proceedings arising under or related to cases under Title 11. See 28 U.S.C. § 1471(b)(1976 ed., Supp. IV) (emphasis added).

According to both the Northern Pipeline plurality and the Court in Crowell, the most significant aspect of the adjunct scheme challenged in Crowell was that "'the reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases.'" Northern Pipeline, 458 U.S. at 81, quoting Crowell v. Benson, 285 U.S. at 54. S. 1220 provides that the factual findings of the agency are conclusive if supported by substantial evidence, but the reviewing judicial court retains greater authority with respect to matters of law. See 28 U.S.C. § 2347; Florida East Coast Ry. Co. v. United States, 242 F. Supp. 490, 491 (M.D. Fla.), aff'd, 382 U.S. 161 (1965) (statute providing for judicial review of agency action requires that primary function of reviewing court is to determine whether there is substantial evidence on the record as a whole to support findings of agency, and

---

8/ The only exception to these wide-ranging powers was that bankruptcy courts "may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment." 28 U.S.C. § 1481 (1976 ed., Supp. IV), quoted in Northern Pipeline, 458 U.S. at 55.

whether agency applied proper legal standards in conduct of proceedings before it and in conclusions which it reached); see also Universal Camera Corp. v. NLRB, 340 U.S. 474, 491 (1951). Such a standard of review does not permit the reviewing court to substitute its own views for the agency's judgment, if that judgment has support in the record and applicable law, 9/ but it does leave questions of law to the court's determination. 10/ Because S. 1220 involves a congressionally created right, in distinction to the state common law claim at issue in Northern Pipeline, we do not believe that the assignment of initial adjudicatory functions to an adjunct administrative tribunal is necessarily incompatible with Article III. Cf. Schor v. Commodity Futures Trading Comm'n, 740 F.2d 1262 (D.C. Cir. 1984) (in case involving agency jurisdiction over common law claim, the Northern Pipeline principles concerning congressional discretion to assign judicial power to adjuncts were not satisfied). However, because this determination is a close and questionable one, we prefer to base our conclusion that S. 1220 does not violate Article III, by vesting administrative officials with power to adjudicate fair housing claims, on the "public rights" theory.

The concurrence in Northern Pipeline offers little to either support or detract from the above conclusions regarding S. 1220. The concurrence limited its holding to the case before it -- it concluded that the Bankruptcy Act of 1978 violated Article III to the extent that it permitted a non-Article III tribunal to adjudicate a state common law claim. 458 U.S. at 91. But "sensible interpretation of judicial opinions avoids converting a carefully crafted limitation on a holding into its ratio decidendi." Schor v. Commodity Futures Trading Comm'n, 740 F.2d at 1275. Quite simply, the concurrence provides scant insight on whether S. 1220 creates either a public right or a constitutionally acceptable adjunct system. Because the Article III principles supporting the

---

9/ See American Textile Manufacturers Institute, Inc. v. Donovan, 452 U.S. 490, 523 (1981), New York v. United States, 299 F. Supp. 989, 997 (N.D. N.Y. 1969), aff'd, 396 U.S. 281 (1970).

10/ NLRB v. Yeshiva University, 444 U.S. 672, 691 (1980); Florida Power & Light Co. v. Electrical Workers, 417 U.S. 790, 803 (1974); cf. NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974); NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130-31 (1944).

in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law." Curtis v. Loether, 415 U.S. at 195. Because a damages action under the Fair Housing Act "is analogous to a number of tort actions recognized at common law," 415 U.S. at 195, the Court concluded that it "is an action to enforce 'legal rights' within the meaning of our Seventh Amendment decisions." Id. Consequently, to the extent S. 1220 provides for enforcement in federal court of a statutory action involving legal rights and remedies that the Court has deemed analogous to certain common law actions, a jury trial is constitutionally required upon demand. Curtis v. Loether, 415 U.S. at 195; Pernell v. Southall Realty, 416 U.S. 363, 383 (1974).

The critical question posed by S. 1220 is whether a statutory right to be free from discrimination in the sale, rental, or financing of housing can be both a right enforceable in an administrative action absent a jury trial and a right enforceable in federal court with a jury upon demand.

The Court has long recognized that Congress has discretion to vest the determination of public rights in judicial or administrative tribunals:

> . . . Congress, in exercising the powers confided to it, may establish "legislative" courts . . . to serve as special tribunals "to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it." But "the mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals." Ex parte Bakelite Corp., 279 U.S. 438, 451.

Crowell v. Benson, 285 U.S. at 50-51 (footnotes omitted). Similarly, the plurality in Northern Pipeline acknowledged that

> when Congress creates a statutory right, it clearly has the discretion, in

> defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right. Such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress' power to define the right that it has created.

458 U.S. at 83 (footnote omitted). In light of Congress's substantial discretion to prescribe the manner in which "public" or statutorily-created rights may be adjudicated, we cannot conclude that Congress deprives itself of the power to vest a statutorily-created right to nondiscriminatory housing in an administrative agency simply because it also has provided for the enforcement of the same statutory housing right in the federal courts in which a jury trial must be available. That is, we believe that Congress may create a statutory right that, depending on its mode of enforcement, the forum in which it is to be resolved, or the nature of the remedy available, could be viewed either as a public or a private right. Cf. Merril, Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 384-88 (1982) (holding that implied private cause of action in court is available under Commodity Exchange Act, although Act also expressly provides for administrative reparations procedure and arbitration procedure).

Prior cases consistently indicate that the Seventh Amendment does not prohibit Congress from assigning the adjudication of statutory rights to an administrative forum, even if a jury would have been required constitutionally had Congress assigned adjudication of those same rights to a federal court instead. Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. at 455 (discussing Pernell v. Southall Realty, 416 U.S. 363 (1974); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), and Block v. Hirsh, 256 U.S. 135 (1921)). In Pernell v. Southall Realty, 416 U.S. 363 (1974), the Court held that because Congress provided that statutory actions for repossession of property--which resembled common law actions to recover land--be brought as civil actions in court, the Seventh Amendment required preservation of the right to jury trial. 416 U.S. at 384. However, the Court carefully noted that "[w]e may assume that the Seventh Amendment would not be a bar to a congressional effort to entrust landlord-tenant disputes, including those

over the right to possession [and therefore analogous to a common law action], to an administrative agency." 416 U.S. at 384. Similarly, in Atlas Roofing Co., in which the plaintiffs strenuously argued that the statutory civil penalty proceeding in issue there was a suit at common law within the meaning of the Seventh Amendment 12/, the Court concluded that "even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law," 430 U.S. at 455, the Seventh Amendment did not prevent Congress from assigning adjudication of such civil penalties to an administrative agency with which a jury trial would be incompatible. Id. at 455, 461.

Finally, in Block v. Hirsh, 256 U.S. 135 (1921), the Court upheld Congress's power to transfer temporarily to an administrative commission jurisdiction over an entire range of landlord-tenant disputes that previously had been adjudicated in court with a jury trial right. If Congress by statute could wholly, albeit temporarily, remove a set of common law-type actions from the courts and subject the regulation and adjudication of the same underlying property rights to an administrative agency, then the Seventh Amendment would not appear to bar the less drastic action of providing simultaneously for the adjudication a statutory right in individual judicial actions and administrative proceedings prosecuted by the Government. 13/ As the Court explained in Atlas Roofing, Congress cannot utterly destroy the right to a jury trial by providing for administrative rather than judicial resolution of the

---

12/ See Brief for the Petitioner, Irey, Jr., Inc. v. Occupational Safety and Health Review Comm'n, No. 75-748, and Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, No. 75-746, at 20-42 (October Term, 1976).

13/ We also note that Congress has the power to avoid the strictures of the Seventh Amendment to the extent it can control the jurisdiction of the inferior federal courts, see U.S. Const. art. III, § 1; Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850), and thereby transfer judicial business to the state courts, in which the Seventh Amendment is inapplicable. See Alexander v. Virginia, 413 U.S. 836 (1973). This does not, of course, resolve whether Congress, while continuing to exercise federal power to decide disputes, may eliminate the right of trial by jury simply by changing the federal forum. But it illustrates Congress's considerable discretion to make jury trials available or to exempt adjudication from any Seventh Amendment claims.

vast range of wholly private tort, contract, and property cases that now arise in the courts. 430 U.S. at 457-58. But "where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights," id. at 458, then the right to a jury trial may well be affected by the identity of the forum to which Congress chooses to submit a dispute. Id. at 457-58. See also Myron v. Hauser, 673 F.2d at 1004 ("right to a jury trial turns not solely on the nature of the issue to be resolved but also on the forum in which it is to be resolved") (citing Atlas Roofing); Rosenthal & Co. v. Bagley, 581 F.2d at 1261 (same).

Although we are unaware of statutory schemes in which the individual's jury trial right is contingent on whether the Secretary (or administrator) chooses to proceed in an administrative forum or an individual proceeds in court, we find nothing in the Seventh Amendment that would prohibit such a congressionally devised system. 14/ The Supreme Court has stated that "Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation or prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field." Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. at 455. Nor is there anything inherently impermissible in having a jury trial available in certain instances but not in others in the enforcement of the same right. In Ross v. Bernhard, 396 U.S. 531 (1970), the Court acknowledged that prior to the 1938 Federal Rules of Civil Procedure, which merged the law and equity functions of the federal courts, a defendant would not be entitled to a jury trial in a stockholder's derivative suit even though the defendant would have had a

---

14/ The Commodity Exchange Act appears to establish an enforcement structure most analogous to S. 1220. Under that Act, an individual may proceed with a private damages action in court, in which a jury trial would be available, or the individual may file a complaint seeking an administrative award of damages. Although the individual, as opposed to any agency official, prosecutes the administrative claim, the administrative reparations procedure will go forward only if the CFTC determines that the complaint warrants administrative action. 17 C.F.R. § 12.15 (1984). However, the reparations procedure is not available against the commodities exchanges, nor is it suited for the adjudication of all other claims under the Act. See Merrill, Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. at 384-85.

right to a jury trial had the corporation itself sued on the same underlying claim. See 396 U.S. at 536-37, 540. 15/

Significantly, the Court recently sanctioned the availability of both an individual court action, in which a jury trial presumably would be available upon demand, 16/ and administrative proceedings, in which an injured individual could obtain damages from another private party absent a jury trial, in Merril, Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353 (1982). In that case the Court held that Congress intended to preserve a private judicial remedy as a supplement to the express enforcement provisions -- an administrative reparations procedure, an arbitration procedure provided by every contract market, and State parens patriae actions -- under the Commodity Exchange Act. Although the Court found that the informal arbitration and reparations procedures were designed to supplement the private judicial remedy, and that Congress apparently intended complainants "to be put to the choice between informal and judicial actions," 456 U.S. at 385, there was no question that damages against a futures commission merchant or other registered person could be obtained in either administrative reparations proceedings absent a jury trial or in a private judicial action. Id. at 366, 385-87. 17/ Nevertheless, the Court expressed no concern that the Seventh Amendment might prohibit an interpretation of the statute authorizing the award of damages in favor of a private complainant in either an administrative proceeding absent a jury trial or in a judicial proceeding with a jury available on demand.

15/ Similarly, because the Seventh Amendment does not apply in actions against the federal government, persons seeking relief from the federal government on causes of action in which they would have had a jury trial right were the action brought against some other party, will often have no jury trial right. See Lehman v. Nakshian, 453 U.S. 156 (1981) (although jury trial generally available in Age Discrimination in Employment Act (ADEA) suits, Congress did not create a jury trial in suits against the federal government).

16/ See Miller v. New York Produce Exchange, 550 F.2d 762 (2d Cir.), cert. denied, 434 U.S. 825 (1977).

17/ Moreover, because the CFTC, similar to the Secretary under S. 1220, determines whether a complaint warrants further administrative action, see 17 C.F.R. § 12.15 (1984), both schemes ultimately vest a government official with some authority to determine whether a defendant will appear in an administrative forum or a judicial forum.

Consequently, assuming that S. 1220 involves a public or statutorily-created right that Congress may, compatible with Article III, assign to an adjunct for adjudication, we do not believe that the Seventh Amendment exercises any independent constraint on Congress's discretion to provide for both administrative and judicial enforcement if it determines that alternative mechanisms are necessary to remedy a particular problem. Cf. Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. at 444-45 (Congress enacted OSHA because it found existing state statutory and state common-law remedies inadequate to protect employees from unsafe working conditions). Insofar as the administrative proceeding provides a remedy for a congressionally created right, Congress has latitude to alter the scope of the jury trial right as a reasonably necessary incident to other procedural and substantive objectives, because doing so, by definition, does not withdraw the jury trial in an area where historically it was firmly established.

3. Assuming there are no Seventh Amendment concerns, does the statutory scheme nevertheless violate due process insofar as the defendant landlord's jury trial right is in large part contingent on the procedural choices of other parties in the proceedings?

Generally, statutory schemes do not authorize the Government to enforce the same underlying charge by providing it with discretion to pursue somewhat similar remedies either administratively without a jury or in court with a jury. Nor is it customary for statutes to provide a choice between individual court actions with jury trials and government initiated proceedings in administrative forums. Most statutes that create dual enforcement mechanisms authorizing government suits as well as private actions either provide for jury trials in court actions regardless who enforces the statutory right 18/, or do not make jury trials available, irrespective of whether the Government or a private person is the enforcing

---

18/ See E.E.O.C. v. Brown & Root, Inc., 725 F.2d 348 (5th Cir. 1984) (jury trial available whether government sues under § 7(b) or private party sues under § 7(c) of Age Discrimination in Employment Act); E.E.O.C. v. Corry Jamestown Corp., 719 F.2d 1219 (3d Cir. 1983) (same); Wirtz v. Jones, 340 F.2d 901, 904 (5th Cir. 1965) (§ 16 actions under Fair Labor Standards Act brought by either an employee or the Secretary are triable before a jury).

party. 19/

These congruences do not exist, however, if statutory provisions provide different remedies to enforce the same underlying claim in a judicial forum. For example, § 17 of the Fair Labor Standards Act (FLSA) authorizes the Secretary of Labor to seek injunctive relief, including the restitutionary restraint of any withholding of wages found due, in court absent a jury trial, while § 16 of the FLSA grants the Secretary or private parties authority to seek legal relief in court with a jury trial. Wirtz v. Jones, 340 F.2d 901 (5th Cir. 1965). The Age Discrimination in Employment Act (ADEA) similarly authorizes the Equal Employment Opportunity Commission (E.E.O.C.) to seek an injunctive remedy in court, in which no jury trial is available, to enforce the statutory prohibition against age discrimination, whereas an individual employee may proceed with a damages actions under the ADEA in which a jury trial would be required upon demand. See 29 U.S.C. § 626(b) (provisions of ADEA to be enforced in accordance with powers, remedies and procedures of FLSA). Significantly, under both the FLSA and ADEA the individual's right to bring a private action terminates upon the filing of a complaint by the Secretary or the E.E.O.C., respectively. See 29 U.S.C. § 216(b) (FLSA); 29 U.S.C. § 626(c)(1) (ADEA); Donovan v. University of Texas, 643 F.2d 1201, 1207 (5th Cir. 1981). Should the Secretary seek equitable rather than legal relief the parties would have no right to a jury trial even though a jury trial would have been available had an individual brought a damages action. See Wirtz v. Jones, 340 F.2d at 904. Thus, simply because a party may have a right to a jury trial in certain instances when a particular right is being enforced against him, it does not follow that a jury trial is always available for that party in the enforcement of that right.

In this context, it is significant that S. 1220 provides for somewhat different remedies in jury and non-jury proceedings. Punitive damages for the individual are available in judicial actions under S. 1220; compensatory damages for the individual and a civil penalty for the Government are available in the administrative proceedings. Because the Court has never held it unfair or arbitrary to have juries available some of the

---

19/ See Slack v. Havens, 522 F.2d 1091, 1094 (9th Cir. 1975) (no jury trial right in Title VII suits); cf. Great American Federal Savings & Loan Ass'n v. Novotny, 442 U.S. 366, 375 (1979) (courts of appeals have held that no jury trial right exists in Title VII actions because all relief is equitable in nature).

time but not all of the time, depending on the nature of the right, the remedy and the forum in which the right is enforced, we find nothing in the Due Process Clause that precludes Congress from providing for the enforcement of the statutory right to nondiscriminatory housing in either administrative forums without a jury or judicial forums with a jury. Cf. Anniston Mfg. Co. v. Davis, 301 U.S. 337 (1937) (Congress may abrogate judicial proceeding if the substituted administrative proceedings afford a fair and adequate remedy). Indeed, it would be anomalous to conclude that the Due Process Clause places a more severe constraint on Congress's discretion to vest adjudication of congressionally created rights in administrative forums than do the more specific commands of the Seventh Amendment or Article III.

Conclusion

Because we believe that the courts would characterize the statutory right to nondiscriminatory housing created by S. 1220 as a public right, Congress, consistent with Article III, may vest the adjudication of housing discrimination claims in an administrative tribunal. Moreover, we conclude that the Seventh Amendment does not prohibit Congress from vesting the adjudication of this congressionally-created right both in federal court, in which a jury trial would be available upon demand, and in an administrative tribunal, in which there would be no right to a jury trial. Finally, we believe that a statutory scheme in which a defendant landlord's jury trial right is in large part contingent on the procedural choices of other parties to the proceeding does not offend the Due Process Clause. We accordingly conclude that although the question is novel and the available judicial precedents provide uncertain guidance, Congress constitutionally may provide for an administrative award of compensatory damages to an individual, even though such damages are also statutorily authorized in judicial actions in which either party is entitled to a jury trial on demand.

Ralph W. Tarr
Acting Assistant Attorney
General
Office of Legal Counsel

Deputy Assistant Attorney General
Office of Legal Counsel

Department of Justice
Washington, D.C. 20530

JAN 25 1978

MEMORANDUM FOR THE HONORABLE RUTH T. PROKOP
General Counsel, Department of Housing and
Urban Development

Re: Constitutionality of Section 810 of H.R. 3504
(The Edwards-Drinan Bill)

This is in response to your letter of November 18, 1977, 1/ requesting this Office's opinion concerning the constitutionality of the civil damages provisions of the Edwards-Drinan bill (H.R. 3504). Specifically, you have inquired whether the bill's administrative complaint procedure offends the Seventh Amendment guarantee that "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." For the reasons that follow, it is our opinion that the provisions in question are suspect under the recent Supreme Court decisions interpreting the Seventh Amendment. As you are aware, the issue is a close one and would almost certainly be litigated. With these considerations in mind, we have suggested several ways in which the language of the provision could be altered to improve its chances of withstanding scrutiny.

I.

H.R. 3504 would amend Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 et seq., by creating three alternative mechanisms for enforcement of its fair housing provisions. Section 812 preserves private enforcement by means of civil suit; section 811 provides for "pattern or practice" actions by the Attorney General. Most importantly, for purposes of this discussion, the bill authorizes the Secretary of Housing and Urban Development (HUD), either in response to a private complaint or on her own initiative, to investigate allegations of discriminatory housing practices. If she finds reasonable cause to believe the charges to be true, she is required either to refer the matter to the Attorney General for the filing of a civil action against the offender, or to file an administrative complaint. If the administrative procedure is followed, the respondent is entitled to notice and to the opportunity for a hearing on the record; the

---

1/ We wish to express our appreciation for the manner in which your request was prepared for presentation to this Office. While it has long been the practice of the Office of Legal Counsel to request that general counsels provide us with a statement of their views, we too frequently have not been aided by the sketchy and incomplete presentations provided. We have been materially assisted by the clear exposition of the issues as set forth in your submission.

person conducting the hearing may also allow any aggrieved person to intervene. The hearing officer, after making findings of fact and conclusions of law, may award various forms of relief including money damages, equitable and declaratory relief, and punitive damages up to $10,000; temporary or preliminary relief is also available pending final disposition of the complaint. Review is in the courts of appeal using a "substantial evidence" standard. The bill also authorizes the Secretary to assess a civil penalty of $1,000 for each day during which a violation continues after the date on which the administrative order becomes unreviewable. Section 811(b) empowers the Attorney General, at the request of the Secretary, to institute civil proceedings to enforce either final orders or civil penalties of this sort.

In applying the Seventh Amendment to this statutory scheme, two principles are immediately clear. First, it is now firmly established that the Seventh Amendment "does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." Curtis v. Loether, 415 U.S. 189, 194 (1974). Thus, the Supreme Court has held that a jury may be demanded in suits in the federal courts for actual and punitive damages under section 812 of the Civil Rights Act of 1968. Id. Similarly, in Pernell v. Southall Realty, 416 U.S. 363 (1974), the Court held that the Seventh Amendment applied in civil suits in the District of Columbia courts for recovery of possession of real property.

A second principle has also emerged -- the Seventh Amendment simply does not apply where Congress has properly assigned the functions of factfinding and initial adjudication to an administrative tribunal with whose proceedings the use of a jury would be incompatible. Thus, in Atlas Roofing Co. v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1977), the Supreme Court upheld Congress' choice of a specialized administrative body to ascertain whether employers were maintaining unsafe working conditions and to impose civil penalties. The Court found no constitutional right to a jury under such circumstances:

> . . . when Congress creates new statutory "public rights," it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be "preserved" in "suits at common law." Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation or prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field. This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law

instead of an administrative agency. 430 U.S. at 455 (footnote omitted). 2/

While it is therefore clear that juries need not be imported into administrative proceedings designed by Congress to give effect to agency expertise, it is also apparent that Congress may not be altogether free to elect such administrative forums under any and all circumstances. Thus, in Atlas Roofing, the Court was careful to go no farther than to approve a jury-free administrative proceeding where "public rights" were involved. 430 U.S. at 458. Unfortunately, this talismanic phrase was not well defined. Instead the Court spoke somewhat circularly in terms of examples --"e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact" (id. at 450); "e.g., where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights" (id. at 458).

The sovereign's prerogative to sue and to be sued as it deems appropriate was similarly recognized and discussed at length in Murray's Lessee v. Hoboken Land Co., 59 U.S. (18 How.) 272, 284 (1856) ("There are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States as it may deem proper.") See also Ex Parte Bakelite, 279 U.S. 438, 451 (1929) ("Legislative courts also may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible to it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.") Accordingly, Congress' choice of administrative forums as means for collecting civil penalties to be deposited into the public treasury has repeatedly been upheld. See, e.g., Helvering v. Mitchell, 303 U.S. 391 (1938).

So, too, has the use of administrative bodies which, in the course of enforcing public policy, incidentally provide relief to private citizens. Thus, in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), the Court upheld agency action under the National Labor Relations Act in requiring a private employer to reinstate an employee with back pay following an unfair labor practice. Likewise, in Block v. Hirsh, 256 U.S. 135 (1921), the Court rejected a Seventh Amendment challenge to a statute temporarily

---

2/ In reaching this broad conclusion, the Court recharacterized the holding of an earlier case, Kachen v. Landy, 382 U.S. 323 (1966), which had upheld the power of a bankruptcy court, exercising summary jurisdiction without a jury, to adjudicate the otherwise legal issue of voidable preferences. Rather than treating this holding as compelled by the traditional distinction between courts of law and courts of equity, the Court observed that this specialized court of equity "constituted a forum before which a jury would be out of place and would go far to dismatle the statutory scheme." 430 U.S. at 454 n. 11.

suspending the legal remedy of ejectment and establishing an administrative tribunal to determine fair rents at which tenants would be allowed to hold over despite the expiration of their leases.

Nevertheless, it cannot be concluded, based on this rather limited evidence, that administrative proceedings initiated by a public agency but providing the full panoply of judicial relief to private parties are necessarily permitted under the Seventh Amendment. The proceedings before the NLRB at issue in Jones & Laughlin were spurred by private complaint, yet the relief available -- reinstatement with back pay or an award of back pay alone -- was basically equitable in nature (cf. Slack v. Havens, 522 F.2d 1091, 1094 (9th Cir. 1975) (Title VII)); moreover, the government agency authorized to hear and decide private complaints, not private individuals who might receive relief in the administrative forum, was alone empowered to trigger proceedings with respect to unfair employment practices and to seek enforcement of its orders in subsequent court proceedings (see Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261 (1940)). The holding of Block v. Hirsh, 256 U.S. 135 (1921), appears relatively narrow when closely examined. While the result in that case has subsequently been characterized rather broadly, 3/ the Court's reasoning may be misunderstood unless seen in context. Mr. Justice Holmes, writing for the Court, spoke specifically in terms of government regulation of the wartime housing industry. Thus, he emphasized that "[i]f the power of the Commission established by the statute to regulate the relation is established, as we think it is . . . this objection [concerning the unavailability of trial by jury] amounts to little. To regulate the relation and to decide the facts affecting it are hardly separable." 256 U.S. at 158 (emphasis added). In Block, therefore, the rent commission played a role comparable to that of the Interstate Commerce Commission or other federal agencies which control the prices charged by private entrepreneurs and incidentally benefit members of the public by requiring those regulated to comply with certain governmentally-set standards. The commission did not simply step into the shoes of a judicial tribunal and afford all-purpose relief to complaining private parties.

An even more important warning is found in Crowell v. Benson, 285 U.S. 22 (1932), which, while sustaining the role of an administrative tribunal in finding facts and awarding relief under the Longshoremen's and Harbor Workers' Compensation Act, characterized the case at bar as "one of private right, that is, of the liability of one individual to another under the law as defined," id. at 51. Thus, although the role of the administrative tribunal in Crowell was solely adjudicatory rather than also prosecutorial in nature, the Court did not dwell on this distinction but focused instead on the nature of the liability created. While the proceedings in Crowell were deemed to be adjunct to the admiralty jurisdiction of the federal courts and therefore to present no Seventh Amendment problem, two conclusions relevant to our consideration here are suggested by this statement: (1) more than a simple "public interest"

3/ "We may assume that the Seventh Amendment would not be a bar to a congressional effort to entrust landlord-tenant disputes, including those over the right to possession, to an administrative agency," Pernell v. Southall Realty, supra, 416 U.S. at 383.

sufficient to sustain Congressional legislation is necessary to come within the phrase "public right" as used in Atlas Roofing; and (2) the nature of relief afforded by an administrative tribunal may not necessarily be irrelevant for Seventh Amendment purposes merely because a government agency plays a formal role in instituting those administrative proceedings.

The constitutionality of the administrative proceedings envisioned by the Edwards-Drinan bill must be tested against this rather inconclusive standard of reference. The proposal and the context in which it arises differ sufficiently from administrative procedures approved under existing case law so as, at the very least, to leave room for doubt. Although HUD, rather than a private plaintiff, would actually be responsible for filing the administrative complaint and would do so only if, in the course of its investigation, it found a charge to be supported by reasonable cause, it would not be the sole enforcer of the statutorily created guarantee of fair housing practices as was true in NLRB v. Jones & Laughlin. Neither would it act in a regulatory capacity akin to that of the rent commission in Block v. Hirsh. Moreover, the Department would enter the fray, not at the outset, but nearly 10 years after the creation of a private cause of action in the district court which provides for identical remedies, and nearly four years after the Supreme Court expressly ruled that under such circumstances trial by jury must be available on demand. It is therefore unlikely that removing section 810's obvious cross-reference to section 812's civil cause of action or the adoption of cosmetic changes in nomenclature will suffice to obviate the potential constitutional questions inherent in the proposal.

It may well be that the courts, when asked to apply the Seventh Amendment in this context, would adopt a broad rule based on the specialized forum approach taken in Atlas Roofing 4/ and the sovereign prerogative analysis of Murray's Lessee. Following this line of reasoning, so long as an administrative agency, and not simply private parties, played a prosecutorial as well as adjudicatory role in administrative proceedings, the Seventh Amendment simply would not apply. The existence of a related private right of action need not undercut the legitimacy of Congress' choice in this regard; rather, the continued availability of such a judicial forum merely provides an alternative means by which private citizens can vindicate the public interest also enforced by the sovereign in its own right.

Different reasoning could, however, dictate a different result. It could be argued that Congress should not be able, under the vague rubric "public right," to circumvent the Seventh Amendment completely by creating a chain of administrative courts capable of giving traditional common law remedies to private litigants seeking relief from wrongs (such as dignitary torts) traditionally regarded as private in character. Plainly, the Seventh Amendment question here is a close and difficult one. Were we to opine one way or the other our conclusion would probably favor a finding

---

4/ Such a ruling could also rest on the expansive dictum in Mr. Justice White's opinion in that case emphasizing the breadth of Congress' prerogative to select the manner in which it will go about resolving important "public" issues. 430 U.S. at 455.

that section 810 is unconstitutional. Rather than concluding our views on this equivocal note, we have considered whether it might be possible to modify section 810 to improve its chances of withstanding constitutional attack. It should be clearly understood, at the outset, that we do not profess to share your Department's expertise and sensitivity to the policy and administrative considerations that would inevitably come into play here. Our advice should be seen as merely suggestive of ways in which the constitutional hurdles could be reduced.

II.

First, private actions in district court seeking actual and punitive damages and other relief might be be preserved, but the nature of the proposed administrative proceedings altered. Use of an administrative forum to impose civil penalties without recourse to trial by jury was expressly approved in Atlas Roofing; provision for equitable relief in the form of temporary or permanent injunctions in no way offends the Seventh Amendment's preservation of juries in "Suits at common law." It could be contended that to thus limit the administrative relief available by omitting any provision for awards of actual or punitive damages would not seriously [illegible]. Actual damages resulting from a violation of the Act are difficult to prove, and the threat of a civil penalty due the government would do as much to encourage compliance with the law as would the possible imposition of punitive damages. 5/ This option would seem almost certainly to avoid any possible problem under the Seventh Amendment.

Second, the private action in district court might be eliminated, and the remedies now available in that forum instead provided in the course of administrative proceedings. The development of legislative history demonstrating a belief by Congress in the necessity for a strong governmental role in order to vindicate the public interest in nondiscriminatory housing practices would provide added support for the claim that the choice of an administrative forum was more than a ruse to eliminate Seventh Amendment rights incident to the existing civil cause of action. This option would be further strengthened if the provision for punitive damages were eliminated and civil penalties instead imposed to run in favor of the government rather than the private complainant.

Third, the bill's treatment of the mechanism by which administrative awards are to be enforced could be modified. Section 811(b) indicates that the Secretary of HUD may request the Attorney General to institute civil proceedings for this purpose; it may, therefore, be inferred that no power to sue for enforcement is meant to lie in the

---

5/ Moreover, the bill as presently drafted seems to invite money-minded plaintiffs to bring charges in the administrative forum, then to return to the district court if their initial efforts prove unsuccessful. The resulting duplicated effort by administrative and judicial officers, costs to defendants, and problems of res judicata would seemingly be at least somewhat reduced if injunctive relief were the only remedy available in both forums.

private complainant. Express language disallowing such claims by other than the Attorney General could enhance the claim that a public right, not a private right, is being vindicated. Consideration might also be given to vesting the reviewing circuit court of appeals with the power to enforce such awards (see, e.g., 15 U.S.C. § 45(d), the review provision applicable to orders of the Federal Trade Commission under section 5 of the Federal Trade Commission Act) instead of simply incorporating the provision authorizing such courts to enjoin, set aside, suspend or determine the validity of orders as set forth in 28 U.S.C. § 2342. The awkward asymmetry of a civil suit in which jury trial is guaranteed pursuant to Curtis, and an enforcement action, also in the district court, which provides absolutely identical relief, would therefore be avoided. 6/

Finally, a requirement that the Secretary of HUD determine that administrative proceedings are in the public interest as is the case in FTC proceedings under 15 U.S.C. § 45 would enhance the emphasis upon the "public right" as opposed to "private right" aspects of this bill that are now left to be inferred from the statutory scheme. Although such a change is unlikely to be determinative to a court's interpretation of the measure, it may weigh the balance in favor of sustaining the proposed administrative procedure.

As stated above, we are not in a position to judge the practical merits of any of these options. Nor are we able to assure you that the adoption of any alterations would obviate the possibility of a successful challenge to the administrative procedures contemplated here. We would urge that, whatever course you follow, steps be taken during the legislative process to underline wherever possible the public benefit aspects of this bill.

Larry A. Hammond
Deputy Assistant Attorney General
Office of Legal Counsel

cc: Frank D. Allen, Jr., Esq.
Civil Rights Division

6/ While such an enforcement action is arguably merely an extension of the administrative proceedings and would not, therefore, trigger a right to a jury determination of the underlying facts, a contrary rule has, in the past, been adopted by at least one court with regard to suits to enforce the imposition of civil penalties under the Federal Trade Commission Act. See United States v. J. B. Williams Co., Inc., 498 F.2d 414 (2d Cir. 1974). A court, faced with the incongruous availability of jury trials in suits by private plaintiffs but not in enforcement actions brought by HUD to provide private complainants with identical relief might well determine that jury trials should be afforded in both cases. Such a result could significantly limit the efficacy of the administrative tribunal as a means of speeding the disposition of housing discrimination cases.

Senator HATCH. So far, everyone has been in agreement that the enforcement sections of the fair housing laws need to be strengthened. As we started to address the issue, there were several proposals with regard to improving the adjudication process, but most of these proposals involved the creation of some sort of administrative procedure.

If, as we have been discussing, the right to a jury trial must be preserved in fair housing cases in which damages are sought, is there any other proposal which you could suggest that would still allow us to reach our goal of improving the current state of enforcement with regard to fair housing laws?

Mr. REYNOLDS. Well, I think that this conclusion, as my testimony indicates, on the constitutional question does not suggest that there is not a need for amendment. There are some alternatives and options.

The administration had a bill that was introduced in the House and the Senate last session which clearly would not have suffered from any of the constitutional complications that we suggested. That is one alternative.

I think I discussed with Senator DeConcini another one with regard to ways in which you could shape an alternate review process. Certainly, if you did something with the consent of the parties, it seems to me that would be another way to avoid some of the difficulties that are suggested by the seventh amendment. So I think that there are alternatives that are available.

Senator HATCH. Well, that is great.

Thank you so much. That is all I have to ask.

Mr. REYNOLDS. Thank you.

Senator DECONCINI. Very good. Mr. Reynolds, thank you very much. Do you have any other statements you care to make?

Mr. REYNOLDS. I did not get a chance to finish my prepared statement, but if it could be put in the record in its entirety, I think that would be fine.

Senator DECONCINI. We will have it put in the record, without objection.

Mr. REYNOLDS. Thank you very much, Senator.

Senator DECONCINI. Thank you very much for your time and responsiveness.

[The prepared statement of Mr. Reynolds plus additional material follow:]

Department of Justice

STATEMENT

OF

WM. BRADFORD REYNOLDS
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
UNITED STATES DEPARTMENT OF JUSTICE

I appreciate the opportunity to appear before this Subcommittee today to discuss the Justice Department's views regarding the Supreme Court's recent decision in Tull v. United States, No. 85-1259 (April 28, 1987), and the impact of that decision on current Congressional efforts to amend the Fair Housing Act.

Let me preface my remarks on this discrete subject with a strong reaffirmation of the Administration's support for amendments to Title VIII that will enhance enforcement capability under the statute and ensure more comprehensive coverage. To this end, the Administration has in the past endorsed fair housing legislation that seeks to correct deficiencies in the existing law. It is presently undertaking to fashion a compromise bill that will serve the same purpose while meeting concerns raised by S. 558.

As I earlier testified in hearings before the Subcommittee on April 7, 1987, this latter effort has focused in significant part on an alternative procedure to the Administrative Law Judge (ALJ) process contained in S. 558. That alternative procedure contemplates resort to formal arbitration as a means of resolving disputes arising from complaints of housing discrimination which have no prospect of conciliation. Compensatory and limited punitive damages were among the remedies that we were considering

78-076 O - 88 - 27

making available to the arbitrator -- remedies which resemble the relief available in S. 558 under the proposed ALJ process.

With the Supreme Court's decision in Tull, we have been forced to rethink our earlier position concerning the Fair Housing Amendments. In Tull, the Court held that a defendant was entitled to have liability determined by a jury in a district court action brought by the United States seeking equitable relief and civil penalties pursuant to the Clean Water Act, 33 U.S.C. 1319(b) (injunctive relief) and 33 U.S.C. 1319(d) (civil penalty not to exceed $10,000 per day). Central to this determination was the Seventh Amendment, which guarantees that:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved * * *.

Differentiating between actions at law (to which the Seventh Amendment applies) and actions in equity (to which it does not), the Court focused principally on the request for civil penalties. "A civil penalty was a type of remedy at common law that could only be enforced in courts of law," it stated (slip op. at 9). The intent was essentially punitive -- rather than one aimed at "extract[ing] compensation or restor[ing] the status quo" (ibid.) -- and consequently, under the Tull decision, such relief could issue only after a jury determined liability in a court of law. Similarly, actions seeking punitive damages are, according to Tull, subject to the Seventh Amendment "jury trial" requirement.

For present purposes, I think it is fair to conclude that the most obvious and certain effect of Tull is that under both S. 558 and the alternative proposal being considered by the Administration (each of which contemplates court awards of civil penalties and punitive damages), fair housing defendants would be entitled, on demand, to a jury trial on the issue of Title VIII liability in any case brought against them in an Article III court -- whether it be in a private enforcement action or a "pattern or practice" action brought by the Attorney General.

This reading of the Court's decision takes us beyond where we were prepared to go under a Seventh Amendment analysis prior to Tull. Our sense, then, as we unsuccessfully argued to the Tull Court, was that civil penalties need not implicate the constitutional right to jury trial, but can appropriately be understood in some circumstances as essentially equitable relief. The Court has now advised us otherwise.

There is another sobering ramification of Tull. A key to the Supreme Court's resolution of the Seventh Amendment question in the case rested essentially on whether the cause of action sounded in law or in equity. That analytical approach would appear in the present context to give added prominence to an earlier Supreme Court decision in the case of Curtis v. Loether, 415 U.S. 189 (1974). There, the Court held that a jury trial would be constitutionally required in an Article III court action, so long as the private litigant could recover the traditional "legal" remedy of actual, compensatory damages. "A damages action * * * sounds basically in tort," the Court concluded (id. at 194-195). Notably, Loether involved a lawsuit by an aggrieved person under Section 812 of the Fair Housing Act.

To be sure, neither Tull nor Loether addressed directly the separate question whether Congress can properly circumvent the Seventh Amendment "jury trial" requirement by assigning housing disputes to administrative tribunals (whether ALJs or formal arbitration) for resolution in the first instance. There is Supreme Court precedent at least suggesting such a possibility. See Atlas Roofing Co. v. Occupational Safety and Health Comm'n, 430 U.S. 442 (1977).

In the present context, however, Atlas Roofing Co. seems to cut against the proposed fair housing amendments that seek to substitute an administrative process, complete with compensatory and punitive damages, for Article III adjudication. The Supreme Court in that case drew a distinction between what it termed

"public rights" and "private rights." As it there explained (id. at 458):

> Our prior cases support administrative factfinding in only those situations involving "public rights," e.g., where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract and property cases, as well as a vast range of other cases, are not at all implicated.

There is admittedly no clear bright line between what are appropriately regarded as "public rights" and what are appropriately regarded as "private rights," and Supreme Court precedents in this area have failed to provide precise definitions. See Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69 (1982). Nonetheless, when the holding in Loether (to the effect that a damages claim under the Fair Housing Act "sounds basically in tort") is read together with the most recent Seventh Amendment ruling in Tull (that categorically rejected our invitation to regard civil penalties as equitable relief rather than a remedy at common law), the decided tilt appears to be against the constitutionality of the sort of administrative provisions that are currently under consideration by this Subcommittee. Thus, since the Supreme Court has now ruled that both the cause of action under the Fair Housing Act and remedies of the type that are provided under the Fair Housing Act are the type that would have required liability to be determined by juries when the Constitution came into being, there is a strong presumption that these cases must remain within the exclusive domain of Article III judges and juries.

Other indicia of unconstitutionality are found in Atlas Roofing Co. as well. Wholly apart from its lineage as a common law tort, the right at issue under the Fair Housing Act is not "public" in any traditional sense. Congress itself recognized at the time of its enactment of Title VIII that housing disputes are by and large between a landlord and tenant (or prospective tenant), or the buyer and seller of a home. They do not raise

larger issues between Government and its citizens, or call upon the government to sue in its sovereign capacity. Indeed, it is precisely because of a recognition that such disputes are quintessentially private and in need of prompt resolution that an administrative process has been recommended in the present circumstances. To the extent the proposed administrative procedure contemplates Secretary involvement, it is simply as a representative of particular claimants, not as an institutional representative.

Moreover, this is not an administrative process aimed at resolving agency disputes arising under a regulatory scheme. Nor is it a procedure devised to deal with complex and technical issues requiring special expertise and competence beyond what is available in Article III courts. Rather, the entire impetus for the instant amendments is to supplement or displace Article III courts and juries with a more streamlined and truncated review process, responsive to the "quick turnaround" housing needs of individual claimants.

In sum, amendments proposed by S. 558, and contemplated in the Administration's alternative arbitration proposal, would authorize private litigants to pursue traditional common law remedies to recover "legal" damages for violations of traditional common law rights arising between private individuals in an administrative forum -- while simultaneously providing for resolution of these same private, common law claims by an Article III judge and jury, if the aggrieved party chooses to pursue that route. I would add that the damages available to an aggrieved party under S. 558 are <u>exactly</u> the same, whether before an ALJ or an Article III tribunal. Such legislation, if enacted, would in my opinion raise the most serious constitutional concerns. Indeed, were one to conclude otherwise, by regarding these types of claims under the Fair Housing Act as akin to "public" rights which may permissibly be removed by Congress from the domain of judges and juries, there would in truth be little, if anything,

left to the protections of the Seventh Amendment and Article III. For Congress could on such an analysis remove essentially any cause of action from resolution by judge and jury.

The Office of Legal Counsel made the point quite well in 1978, with respect to a nearly identical proposal to revise the Fair Housing Act:

> It could be argued that Congress should not be able, under the vague rubric of "public right," to circumvent the Seventh Amendment completely by creating a chain of administrative courts capable of giving traditional common-law remedies to private litigants seeking relief from wrongs (such as dignitary torts) traditionally regarded as private in character.

It is, therefore, my considered judgment that the current Fair Housing amendments likely suffer constitutionally. This view is shared by the Justice Department's Office of Legal Counsel, in a recently-issued formal opinion on the question. As reflected therein, the combined reading of Tull, Loether, and Atlas Roofing Co. send a clear signal that the present amending language in S. 558, or in the Administration's alternative arbitration proposal, will be unable to withstand a Seventh Amendment court challenge.

In closing, let me emphasize that I by no means intend to suggest by the constitutional concerns I voice today that Congress should abandon its present efforts with regard to fair housing legislation. If administrative review (whether by ALJs or arbitration) is tailored to providing no more than equitable relief to individual housing claimants (i.e., placement plus "make whole" relief), the risk that such an amendment will invite an adverse constitutional ruling is in my opinion largely removed. Similarly, the Seventh Amendment concern could probably be assuaged if de novo court review of the ALJ's or Arbitrator's decision were made available at the district court level, thereby insuring a jury trial on liability to those defendants who wanted to pursue the matter in court.

The Administration stands ready to explore with this Subcommittee these and any other suggestions, in order to resolve the legal complications that I have discussed and produce a meaningful and constitutionally acceptable piece of legislation. I think we all can agree that the most unfortunate result of our efforts and dedication to resolving the issue of housing discrimination would be to have legislation tied up in the courts for years, only to emerge ultimately with a declaration that it fails to pass constitutional muster.

Thank you, Mr. Chairman. I will be happy to answer any questions you and other members of the Subcommittee may have.

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 21, 1987

The Honorable Strom Thurmond
United States Senate
Washington, DC 20510

Dear Senator Thurmond:

Attached you will find answers to questions that you posed to Assistant Attorney General Wm. Bradford Reynolds, following his testimony before the Subcommittee on the Constitution, Committee on the Judiciary, on July 1, 1987, on S.558, a bill entitled the "Fair Housing Amendments Act of 1987."

By copy hereof to the Subcommittee Chairman, we are asking that the questions and answers be made part of the official record of the subcommittee proceedings.

Sincerely,

John R. Bolton
Assistant Attorney General

cc: The Honorable Paul Simon

Enclosures

Questions from Senator Strom Thurmond

Question 1. Mr. Reynolds, is there precedent anywhere in Federal law for a procedure such as the one proposed in S. 558 -- with punitive damages, no agency review, and review in the Court of Appeals?

Answer. I am aware of no such statutory precedent. The fact is, I know of no statutory enforcement scheme where an individual complainant may obtain punitive damages through an administrative tribunal.

Question 2. Everyone appears to agree on the importance of the public rights/private rights dichotomy in Atlas Roofing. However, upon a closer reading of that case, other factors gain importance. For example, the court in Atlas speaks of "factfinding" at the "initial stage." Might such a limitation imply a requirement for a jury trial at some stage of the enforcement process? This "initial stage" language seems to be highlighted by the strong jury right requirement in Tull.

Answer. In Atlas Roofing, 430 U.S. 442, there are at least eight "factors":

1. It must be a situation where "the Government sues in its sovereign capacity." Id, at 450. That is decidedly not the situation here; the government would only be bringing an action on behalf of an "aggrieved party."

2. It must be an action to "enforce . . .new public rights and remedies . . . created by statute" which are "new causes of action, and remedies therefor, unknown to the common law." Id, at 450, 460, 461. The Supreme Court seemingly has addressed the issue of "public versus private" in the Fair Housing context in Curtis v. Loether, 415 U.S. 189, 195-196 (1974), by holding that a damages claim under the Fair Housing Act "sounds basically in

tort," and that the relief -- actual and punitive damages -- is the "traditional form of relief offered in the courts of law." Tull reinforced and more clearly defined that position on the issue of liability for damages.

3. The delegation of authority from Congress is limited to a "factfinding function and initial adjudication" of the issue. Id, at 450 (emphasis supplied). I, likewise, am drawn to the Court's use of the word "initial." It certainly seems to suggest some later adjudication, presumably in a context and forum that affords the litigants protections guaranteed under the Seventh Amendment.

4. The "administrative forum" must be one in "which the jury would be incompatible." Id, at 450.

5. The forum must be a "special tribunal 'to examine and determine various matters, arising between the government and others.'" Id, at 452, quoting Crowell v. Benson, 285 U.S. 22, 50-51 (1932). As indicated above, the housing complaints in question are fundamentally claims involving private parties; they do not involve the government in its sovereign capacity or implicate any governmental activity.

6. The statutory scheme must involve "new types of litigation." Id, at 455. Certainly, even under existing law, we are constantly litigating claims of discrimination in housing, and have been doing so under the Fair Housing Act for at least eighteen years. It is hard to find any real novelty in housing litigation in such circumstances.

7. The administrative forum is one with "special competence in the field." Id, at 455. No serious claim can be made that the administrative forum created under S. 558 would bring any special competence to the field of fair housing litigation. U.S. _ Districts Courts have been litigating thousands of claims of racial discrimination under our vast array of civil rights statutes for well over two decades now, and claims under the 14th Amendment for more than a century. Similarly, there are innumerable state cases routinely handling fair housing issues.

8. The relief available must be "new remedies where those available in courts of law were inadequate." Id, at 459. As to whether there is an adequate remedy at law for the aggrieved party, Curtis v. Loether has unequivocally answered that question in the Fair Housing context.

Question 3. Some have argued that the only limitation on Congressional prerogatives in transferring causes of action from a court to an administrative proceeding is a "functional" one, that is, the administrative proceeding cannot in essence be a court under another name. A corollary of this "functional test" presumably would be prohibition against such a transferral to an administrative tribunal merely to avoid the jury right. Does S. 558 appear to be such an effort, since the remedies available to a complainant in court or before an Administrative Law Judge are essentially the same?

Answer. At the hearing on July 1, I spoke generally to this point in my prepared statement. Perhaps I can best respond to your question by repeating what I said there, at page 6:

> [T]he entire impetus for the instant amendments is to supplement or displace Article III courts and juries with a more streamlined and truncated review process, responsive to

the "quick turnaround" housing needs of individual claimants.

In sum, amendments proposed by S. 558, and contemplated in the Administration's alternative arbitration proposal, would authorize private litigants to pursue traditional common law remedies to recover "legal" damages for violations of traditional common law rights arising between private individuals in an administrative forum -- while simultaneously providing for resolution of these same private, common law claims by an Article III judge and jury, if the aggrieved party chooses to pursue that route. I would add that the damages available to an aggrieved party under S. 558 are exactly the same, whether before an ALJ or an Article III tribunal. Such legislation, if enacted, would in my opinion raise the most serious constitutional concerns. Indeed, were one to conclude otherwise, by regarding these types of claims under the Fair Housing Act as akin to "public" rights which may permissibly be removed by Congress from the domain of judges and juries, there would in truth be little, if anything, left to the protections of the Seventh Amendment and Article III. For Congress could on such an analysis remove essentially any cause of action from resolution by judge and jury. The Office of Legal Counsel made the point quite well in 1978, with respect to a nearly identical proposal to revise the Fair Housing Act:

> It could be argued that Congress should not be able, under the vague rubric of "public right," to circumvent the Seventh Amendment completely by creating a chain of administrative courts capable of giving traditional common-law remedies to private litigants seeking relief from wrongs (such as dignitary torts) traditionally regarded as private in character.

(Emphasis in original.) The reference to the 1978 statement from the Office of Legal Counsel is from the opinion of that office dated January 25, 1978, at page 8, which has been placed in the record of the official proceedings of the Subcommittee.

Senator DECONCINI. The next witness is Prof. Geoffrey Hazard of the Yale Law School.

Mr. Hazard, I notice your statement is not lengthy at all here, so please proceed. If you care to give it all, we certainly have the time for at least the one I have here.

STATEMENT OF GEOFFREY C. HAZARD, JR., STERLING PROFESSOR OF LAW, YALE LAW SCHOOL, NEW HAVEN, CT

Mr. HAZARD. Well, I would be glad to submit it in writing without reading it.

Senator DECONCINI. No. Why don't you go ahead? I think it would be worthwhile.

Mr. HAZARD. My name is Geoffrey C. Hazard, Jr. I live in New Haven, CT, and I am Sterling Professor of Law at Yale University. One of my principal fields of research, writing, and teaching is civil procedure, including the legal and constitutional aspects of jury trial.

I have studied S. 558, having particular regard for the validity of the provision under which claims based on violations may be prosecuted in an administrative hearing before administrative law judges as distinct from an article III court.

The ALJ proceeding authorized by the bill would be brought by the Secretary as distinct from the aggrieved party and may be brought only after the Secretary has considered invocation of a conciliation procedure.

As an alternative, the aggrieved party may maintain the civil action in the district court. In that alternative, the aggrieved party rather than the Secretary has control of the action. The remedies that may be granted under the two alternative procedures are substantially similar, including compensatory damages, punitive damages, and attorneys' fees.

The question is whether the ALJ alternative, as it may be called, would be regarded as unconstitutional because it does not afford jury trial. In my opinion, the right enforceable through the ALJ alternative is sufficiently distinctive as to justify providing for its determination in an administrative tribunal.

Congress can reasonably determine that there should be a remedial route that involves participation of the Secretary, with attendant control of the proceeding on his part, and the intercession of conciliation in appropriate cases. These are distinctively administrative processes, although, of course, it would be possible to provide them in an article III proceeding.

However, the point is that vesting prosecutorial authority in the Secretary and providing for conciliation are uncharacteristic of suits at common law, and it is to such suits that the jury trial guarantee of the seventh amendment applies.

Given these characteristics of the remedial alternative that the bill consigns to ALJ adjudication, in my opinion the remedial arrangement would be governed by the *Atlas Roofing* decision, and accordingly would be held to be constitutional.

My conclusion thus accords with that of Dean Carrington and Professors Rowe and Wolf, whose statements I have read, sir. I have also read the memorandum submitted by the Washington

Legal Foundation. This memorandum adduces policy considerations concerning the ALJ alternative that are entitled to serious deliberation.

On the constitutional issue, however, the argument it advances is strained and seems to me not to acknowledge the effect and continued force of the *Atlas Roofing* decision. The very awkwardness of the argument therefore suggests that its conclusion is incorrect. In any event, I believe the Supreme Court would sustain the validity of S. 558 as it stands.

It may be worth considering whether the remedial structure in the bill might be changed so that the remedies available through the ALJ alternative are compensation, attorneys' fees, and a civil penalty payable to the government rather than punitive damages payable to the aggrieved party.

Such a modification obviously involves policy considerations, but it would further differentiate the ALJ alternative from a civil action by the aggrieved party and thus bring it more clearly under the rubric of the *Atlas Roofing* decision.

I suppose I could elaborate on any part of that, Senator, but I tried to make it concise and to the point.

Senator DECONCINI. Thank you very much.

Just so I understand now, your position is very clear as to the constitutionality of the administrative law procedures for the determination of discrimination?

Mr. HAZARD. Yes, sir.

Senator DECONCINI. And as to damages, what is your position? If it is there, I missed it. Can the ALJ conclude and determine and award damages?

Mr. HAZARD. If I could back up just a little bit, what we are talking about is a right created by public law that is quite at variance with the common law rights of the parties. At common law, an owner of property has an unqualified right to refuse to rent to anyone he does not want to rent to, so that this is not a right of action founded in common law.

Senator DECONCINI. This would not be a tort action?

Mr. HAZARD. Well, that is another question.

Senator DECONCINI. OK. It is not a common law——

Mr. HAZARD. It is not a right founded in common law. It is a right founded in statute.

Senator DECONCINI. So you would not call it a traditional common law tort action?

Mr. HAZARD. Well, let me put it another way. I think if you have a statutory right with damages by the injured party in an article III court where the reparations are called damages and could not fairly be called restitution, the Supreme Court would hold, and rightly, that that is covered by the seventh amendment as a suit sufficiently like a suit at common law that the seventh amendment guarantee apply to.

Senator DECONCINI. OK.

Mr. HAZARD. And I take it that the right created here is permitted to be enforced by the aggrieved party in the Federal District Court, and as Mr. Reynolds said, would be governed by the jury trial right, and I agree with that.

The question is whether a statutorily created right, as distinct from a common law right, consigned to the jurisdiction of an administrative tribunal, prosecutable by a government official who controls the action and not prosecutable simply at the initiative of the injured party, in which you have an additional remedial process, a conciliation apparatus—but I think independent of that, and where reparations may be afforded—you can call them damages, but we could call them reparations—whether such a proceeding may go forward before an ALJ without a jury.

Senator DECONCINI. I am sorry I did not explain it that way. You did a much better job, but that is my question.

Mr. HAZARD. Well, that is what I spend my life doing. [Laughter.]

Senator DECONCINI. So what is the answer?

Mr. HAZARD. Well, I think that in those circumstances the Court would sustain the proceeding and would hold the seventh amendment does not apply. It seems to me that that is essentially what was involved in Crowell against Benson, which is a worker's remedy for injury during the course of employment.

Senator DECONCINI. Is that based on a fine definition or a very restricted definition as to what can be awarded as far as the restitution?

Mr. HAZARD. I do not think so, Senator. It seems to me that there is no single determinant of classification here.

Senator DECONCINI. In other words, you could permit an administrative law judge, having a complaint before it by the government authority, to award unlimited damages and still be constitutional, in your judgment?

Mr. HAZARD. Yes. I mean unlimited, except by some principle related substantively to the complaint.

Senator DECONCINI. Yes.

Mr. HAZARD. I mean, administrative law judges do so. You have, for example, in the Court of Claims, or even indeed in the defense contract adjustments procedure, cases that are as big as anything in the Federal District Courts.

Senator DECONCINI. Let me ask this question. This particular fair housing proposal that we are discussing, does this create a public right of action or a public right of action, or both?

Mr. HAZARD. Well, much significance is attached to that phrase that was used in *Atlas Roofing*. To the extent that the phrase is illuminating, and it is illuminating to some extent in my opinion, it seems to me that if the right is statutorily created and is enforceable by an administrative official whose presence is more than nominal—there is some control over the action, as I describe it—it seems to me it is fair to call that a private right even though it results in monetary reparations that go to a private party.

That is essentially the *Jones and Laughlin* case, and indeed *Crowell* against *Benson*, the workman's compensation proceeding, has some resemblance to that. So I think we have settled precedent by a court of considerable stature under Chief Justice Hughes that held that the jury trial guarantee did not preclude that form of congressionally provided remedy in the *Jones and Laughlin* case.

Senator DECONCINI. Thank you. I have no further questions. The chairman is on the floor, Professor Hazard, and cannot return right now. He has been waiting for recognition and either has it or

is about to get it, and it is kind of crowded over there right now. It is a little bit like flying over O'Hare Airport.

So I would ask if you would be kind enough to respond to some questions from the chairman and other members, if you do not mind doing that for us in your due time.

[The prepared statement of Mr. Hazard follows:]

PREPARED STATEMENT OF GEOFFREY C. HAZARD, JR.

STERLING PROFESSOR OF LAW, YALE LAW SCHOOL

My name is Geoffrey C. Hazard, Jr. I live in New Haven, Connecticut, and I am Sterling Professor of Law at Yale University. One of my principal fields of research, writing and teaching is Civil Procedure, including the legal and Constitutional aspects of jury trial.

I have studied S. 558, having particular regard for the validity of the provision under which claims based on violations may be prosecuted in an administrative proceeding before Administrative Law Judges as distinct from an Article III Court. The ALJ proceeding authorized by the bill would be brought by the Secretary as distinct from the aggrieved party, and may be brought only after the Secretary has considered invocation of a conciliation procedure. As an alternative, the aggrieved party may maintain a civil action in the District Court. In that alternative, the aggrieved party, rather than the Secretary, has control of the action. The remedies that may be granted under the two alternative procedures are substantially similar, including compensatory damages, punitive damages, and attorneys fees.

The question is whether the ALJ alternative, as it may be called, would be regarded as unconstitutional because it does not afford jury trial. In my opinion, the right enforcible through the ALJ alternative is sufficiently distinctive as to justify providing for its determination in an administrative tribunal. Congress can reasonably determine that there should be a remedial route that involves participation of the Secretary, with attendant control of the proceeding on his part, and the intercession of conciliation in appropriate cases. These are distinctly administrative processes, although of course it would be possible to provide them in an Article III proceeding. However, the point is that vesting prosecutorial authority in the

Secretary and providing for conciliation are uncharacteristic of "suits at common law," and it is to such suits that the jury trial guarantee of the Seventh Amendment applies. Given these characteristics of the remedial alternative that the bill consigns to ALJ adjudication, in my opinion the remedial arrangement would be governed by the Atlas Roofing decision and, accordingly, should be held to be constitutional.

My conclusion thus accords with that of Dean Carrington and Professors Rowe and Wolf. I have also read the memorandum submitted by the Washington Legal Foundation. This memorandum adduces policy considerations concerning the ALJ alternative that are entitled to serious delibration. On the constitutional issue, however, the argument it advances is strained and seems to me not to acknowledge the effect and continued force of the Atlas Roofing decision. The very awkwardness of the argument, therefore, suggests that its conclusion is incorrect. In any event, I believe the Supreme Court would sustain the validity of S. 558 as it stands.

It may be worth considering whether the remedial structure in the bill might be changed so that the remedies available through the ALJ alternative are compensation, attorneys fees and a civil penalty payable to the Government, rather than punitive damages payable to the aggrieved party. Such a modification obviously involves policy considerations, but it would further differentiate the ALJ alternative from civil action by the aggrieved party and thus bring it even more clearly under the ribric of Atlas Roofing.

Senator DECONCINI. The hearings will stand adjourned. Thank you, sir.

[Whereupon, at 3:02 p.m., the subcommittee was adjourned.]

APPENDIX

ADDITIONAL STATEMENTS

American Association of University Women

2401 Virginia Avenue, NW, Washington, DC 20037
(202) 785-7700

President
Sarah Harder

March 17, 1987

Dear Senator Simon:

On behalf of the American Association of University Women may I extend our appreciation for your introduction of the Fair Housing Amendments of 1987. Please be assured of AAUW's strong support.

The issue of housing has been an AAUW legislative concern since 1916 and has been a part of the Association legislative program since the 1940s. AAUW supported the 1948 Taft-Ellender-Wagner housing bill that provided financial aid to private enterprise, encouraged building of rental housing, and assisted communities in urban redevelopment.

In supporting the Civil Rights Act of 1968, AAUW also supported the housing elements of the Act which prohibited discrimination in housing practices based on race, religion, color, national origin, and sex.

AAUW's major legislative effort in housing was made during the 96th Congress in support of the Fair Housing Amendments of 1980. AAUW gave full lobbying priority to this bill, including work by the Lobby Corps and action alerts to branches and state divisions.

AAUW is once again working in coalition with the Leadership Conference on Civil Rights to enact the Fair Housing Amendments of 1987.

If we can be of further assistance, please contact our Assistant Director of Legislative Affairs, Kristin Stelck, at 785-7713.

Sincerely,

Sarah Harder

Sarah Harder

AMERICAN
CIVIL
LIBERTIES
UNION OF
ILLINOIS

Suite 816
220 South State Street
Chicago, IL 60604
(312) 427-7330

BOARD OF DIRECTORS
Diane Geraghty
President
Ralph Goldenberg
Vice President, Development
Marcia Lipetz
Vice President, Legislation
Laura Miller
Vice President, Membership
Jeffrey Shaman
Vice President, Policy
Margo Kruger
Vice President, Program
Edwin A. Richfield
Vice President, Litigation
General Counsel
Roger Peace
General Counsel
Lya Dym Rosenblum
Secretary
Louis A. Weiss
Treasurer
Robert Bennett
Honorary Board Representative
Peter Bergson
Laurie Bernell
Lorne Bolin
Jeffrey Colman
Rachel Rosen DeSoto
Fran Eichner
Anne Fleming
Larry Gelder
David Hacker
Frank Hamilton
Phyllis Hendelman
Michael Hennes
F. Thomas Hiatt
Christie Hefner
Joel Hellring
Barbara Hirsch
James Huntington
Angela Hubbard
Arnold H. Jones
Burton Joseph
Harold Katz
Alan Lapidus
Richard Lehne
Lois Lipton
George Mitrick
Zena Naddrich
Dawn Clark Netsch
Gloria Pamintuan
Alexander Polikoff
Anne Pope
Richard Ring
Raymond Rotman
Nancy Rotner
Marie Royce
Bertha Sanchez
Margaret Sandler
Reverend Charles Scheer
Eric Steele
Lew Sloan
Edward T. Stein
John Van Dorn
Oscar Varnon
Kate Wiener
Harvey S. Wineberg
Quentin Young
James Zacharias
Frances Kahn Zemans

CHAPTER REPRESENTATIVES
Scott Lamberg
Terry Garvey
Bruce Hill
Loren Hoffman
Bob Hunter
Herb Lotz
Barbara Mullen
John Nolan
Ira Sacks
Victor Stone
Paul Siegel
Eugene Winick

HONORARY DIRECTORS
Alex Elson
Walter Fisher

STAFF
Jay A. Miller
Executive Director
Kathleen A. Miller
Associate Director
Harvey Grossman
Legal Director
Colleen K. Connell
Mark J. Sisper
Barbara P. O'Toole
Jane M. Whicher
Benjamin S. Wolf
Staff Counsels
Violette Joseph
Intake
Louise E. Johnson
Public Information Director

Legislative & Field Representative
Kathy Phillips
Administrative Assistant

Executive Committee

1987 APR 14 PM 2:10

April 8, 1987

Honorable Paul Simon
462 Dirksen Building
Washington, D.C. 20510

Dear Senator Simon:

We thank you for co-sponsoring the Fair Housing Amendments Act of 1987 (S. 558). The ACLU supports this legislation because it provides a speedy, fair and inexpensive decision process for all parties in cases where persons allege that they have been denied housing because of their race, color, religion, sex, national origin, handicap or familial status.

We appreciate your support of this legislation which should help to expedite fair decisions in housing discrimination situations.

Sincerely,

Kathleen A. Miller
Associate Director

KAM/wap

Anti-Defamation League ADL of B'nai B'rith
823 United Nations Plaza, New York, NY 10017 212-490-2525 Telex 649278

LYNNE JANNELLO
Director, Communications

NEWS

FOR IMMEDIATE RELEASE

Washington DC, April 9....The Anti-Defamation League of B'nai B'rith today submitted testimony before the U.S. Senate Judiciary's Sub-committee on the Constitution urging passage of the Fair Housing Amendments Act of 1987 which proposes the use of administrative law judges to resolve discrimination claims.

According to the testimony, submitted by Michael E. Schultz, chairman of the League's Civil Rights Committee, the enforcement provisions contained in the 1968 Fair Housing Act "as originally enacted are ineffective...leaving many victims of housing discrimination without adequate recourse."

The League pointed out that the use of administrative law judges, an enforcement procedure which has been widely used by other federal agencies, would allow for speedy and inexpensive determination of discrimination claims. "A system of administrative judges, with the power and authority to punish perpetrators of housing discrimination, offers welcome relief to the victims," the League said.

#

Founded in 1913 "to stop the defamation of the Jewish people ... to secure justice and fair treatment to all citizens alike."

Testimony

of

Anti-Defamation League of B'nai B'rith

on

S. 558

Fair Housing Amendments Act of 1987

The Anti-Defamation League of B'nai B'rith welcomes this opportunity to submit a statement to this subcommittee in support of S. 558, the Fair Housing Amendments Act of 1987. The enactment of these amendments would make more meaningful the promise of the Fair Housing Act to promote fair housing for all persons.

Since its inception in 1913, ADL has been committed to eradicating discrimination in its many forms. Although the League was formed in response to the defamation of and discrimination against Jews, the ultimate goal of the League, as declared in our charter, is "to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens." To this end, ADL has actively fought against housing discrimination. The issues confronted have ranged from the discriminatory sale of land or transfer of property to discriminatory real estate advertisements.

In 1947, ADL filed its first amicus curiae (friend of the court) brief in Shelley v. Kraemer, 334 U.S. 1 (1948), the landmark case in which the United States Supreme Court struck down restrictive racial covenants in documents of property conveyance. Since then, ADL has filed many briefs in the United States Supreme Court in housing discrimination cases, including Jones v. Alfred H. Mayer, Co., 392 U.S. 409 (1968), and Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969). Our purpose has been consistent: to remove those barriers which allow or encourage discrimination in housing.

In addition to filing amicus briefs, the League is involved at the grassroots level in handling housing discrimination cases. We have learned that religious discrimination in the sale or rental of housing is very much alive, and that its continuing effect is still quite sinister. And while

housing discrimination has not been eradicated, the potential seeds of its destruction lie dormant because the Fair Housing Act lacks the tools to effectively end the discrimination. As such, the League supports the provisions contained in the Fair Housing Amendments Act of 1987 establishing a complaint resolution mechanism.

It is clear that the enforcement provisions contained in the Fair Housing Act as originally enacted are ineffective. The limited role of the Department of Housing and Urban Development in resolving complaints leaves many victims of housing discrimination without adequate recourse. While the avenue of litigation is open to these individuals, it is both costly and time consuming. The effects of housing discrimination are felt acutely by its victims; their relief should be swift.

The enactment of the Fair Housing Act in 1968 was meant to cure a pervasive and deep rooted problem. While much has been accomplished to cleanse society of housing discrimination, the job has not been complete. A major tool against discrimination has been stymied by a nonresponsive enforcement apparatus. What is needed is a method of enforcement such as the one proposed in S. 558, which would allow for speedy and inexpensive determination of discrimination claims. The legislation proposes the use of administrative law judges, an enforcement procedure which has been widely used by other federal agencies. A system of administrative law judges, with the power and authority to punish perpetrators of housing discrimination, offers welcome relief to the victims. The League urges this subcommittee to adopt the enforcement procedures contained in the bill, which seek to ensure that victims of housing discrimination are not denied their "day in court."

For 19 years, this country has made great strides in overcoming the invidious affects of housing discrimination. There is still much work that we must do to see that fair housing becomes a reality for all Americans. As we approach the bicentennial of our Constitution, the League is hopeful that this subcommittee will remember that equality for all our citizens is the cornerstone of our democracy.

We respectfully request that this statement be included in the printed record of the hearings.

Michael E. Shultz
Chairman
National Civil Rights Committee
April 9, 1987

American Planning Association

Please reply to:
1776 Massachusetts Ave., NW
Washington, DC 20036
Phone 202.872.0611

1313 E. 60th St.
Chicago, IL 60637
Phone 312.955.9100

June 22, 1987

MEMORANDUM

TO: Members of the Senate Judiciary Committee

FROM: Linda E. Hollis, AICP
Chair, National/State Policy Coordinating Committee

RE: S 558, The Fair Housing Amendments Act of 1987

Attached is a courtesy copy of APA's statement on the Fair Housing Amendments Act of 1987, which was delivered on APA's behalf by Gail A. Price, one of our members, before the House Civil and Constitutional Rights Subcommittee. It is our understanding that the Senate Judiciary Committee will be reporting out S 558 this week; toward that end, we commend our statement to you.

Our statement focuses on planners' interest in amending the Act to include families with children, although we are equally supportive of expanding protection to handicapped persons.

Planners are interested in Fair Housing for several reasons. Our adopted policies state, in part, that "governments at all levels should promote the maximum choice of housing type and location for all segments of society." This, of course, includes families with children.

Planners are also responsible for producing the plans that guide fair share housing. Most important of all, planners have the day-to-day responsibility for developing housing elements in local comprehensive or general plans. Planners also play the major role in the drafting of zoning ordinances and subdivision regulations at the local level which can be used to help or hinder families with children to find housing.

The American Planning Association believes that this legislation is needed for the following reasons. (The page numbers included after each reason provide additional information for that reason):

(1) Families have difficulty obtaining housing (pp 8-9);

(2) Families with children comprise a major portion of the homeless (pp 9-10);

(3) Housing discrimination against families with children has been documented by the U.S. Department of Housing and Urban Development (pp 10-11);

(4) State and local studies also substantiate discrimination against families with children (pp 11 -12); and

(5) Housing discrimination has a negative effect on minority and female-headed households (pp 13-14).

Our statement concludes by urging Congress to pass this legislation which stands to benefit the 30 million, or forty percent of all U.S. households, with children under 18 years of age.

Attached to our statement is a documentation of examples of discrimination and an accompanying bibliography.

Attachment

STATEMENT OF

GAIL A. PRICE

ON BEHALF OF THE

AMERICAN PLANNING ASSOCIATION

MR. CHAIRMAN AND MEMBERS OF THE CIVIL AND CONSTITUTIONAL RIGHTS SUBCOMMITTEE

MY NAME IS GAIL A. PRICE. I AM PRESENTING THIS FOR LINDA HOLLIS, THE CHAIRPERSON OF APA'S NATIONAL/STATE POLICY COORDINATING COMMITTEE. I AM A COMMUNITY PLANNER WITH THE COMMUNITY PLANNING SOUTH PLANNING DIVISION OF THE MONTGOMERY COUNTY PLANNING BOARD. THIS IS PART OF THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION. IT PERFORMS THE PLANNING FUNCTION FOR MONTGOMERY AND PRINCE GEORGES COUNTIES IN MARYLAND. I AM RESPONSIBLE FOR PLANNING ACTIVITIES INCLUDING ZONING AND LAND-USE IN THE NORTH, WEST AND EAST SECTIONS OF SILVER SPRING, AS WELL AS CHILD DAY- CARE FACILITY PLANNING, AND HAVE WORKED ON THE DEVELOPMENT OF MASTER PLANS WITHIN MONTGOMERY COUNTY. BASED ON MY EXPERIENCE, I HAVE GAINED AN APPRECIATION OF HOW THE FAIR HOUSING AMENDMENTS COULD AFFECT PLANNING AND HOUSING OPPORTUNITIES AT THE LOCAL LEVEL.

I AM A MEMBER OF THE AMERICAN PLANNING ASSOCIATION, ITS PLANNING AND WOMEN DIVISION AND ITS LOCAL CHAPTER, THE NATIONAL CAPITAL AREA CHAPTER. I AM TESTIFYING ON BEHALF OF THE ASSOCIATION THIS MORNING. I RESPECTFULLY REQUEST THAT THE COMPLETE TEXT OF MY PREPARED STATEMENT BE INCLUDED IN THE HEARING RECORD.

THE AMERICAN PLANNING ASSOCIATION IS A NATIONAL ORGANIZATION OF 21,000 MEMBERS, INCLUDING PUBLIC AND PRIVATE PLANNERS, ELECTED AND APPOINTED OFFICIALS AT ALL LEVELS OF GOVERNMENT, AS WELL AS EDUCATORS, STUDENTS AND INTERESTED CITIZENS. OUR MEMBERS BELONG TO 45 CHAPTERS COVERING EVERY STATE AND CONGRESSIONAL DISTRICT.

APA WAS FORMED IN 1978 WHEN THE AMERICAN INSTITUTE OF PLANNERS, ESTABLISHED IN 1917, AND THE AMERICAN SOCIETY OF PLANNING OFFICIALS, FOUNDED IN 1934, CONSOLIDATED. THE ASSOCIATION'S PRIMARY OBJECTIVE IS TO ADVANCE THE ART AND SCIENCE OF PLANNING FOR THE IMPROVED DEVELOPMENT OF THE NATION AND ITS COMMUNITIES, STATES AND REGIONS. WITHIN APA IS THE AMERICAN INSTITUTE OF CERTIFIED PLANNERS WHICH FOCUSES ON PROFESSIONAL DEVELOPMENT. ITS MEMBERS ARE DISTINGUISHED BY HAVING

MET EXPERIENCE REQUIREMENTS AND HAVING PASSED AN EXAMINATION ON PLANNING PRINCIPLES AND PRACTICES.

PLANNERS' INTEREST IN FAIR HOUSING

IN SPEAKING FOR APA, I WILL FOCUS ON PLANNERS' INTEREST IN THE FAIR HOUSING ACT OF 1987. SPECIFICALLY ON WHY PLANNERS SUPPORT AMENDING THE ACT TO INCLUDE FAMILIES WITH CHILDREN. WE ALSO WANT TO STATE FOR THE RECORD THAT APA IS EQUALLY SUPPORTIVE OF EXPANDING THE PROTECTION OF TITLE VIII OF THE CIVIL RIGHTS ACT OF 1968 TO HANDICAPPED PERSONS.

PLANNERS INVOLVEMENT IN FAIR HOUSING

OUR POSITION SHOULD BE VIEWED WITHIN THE CONTEXT OF PLANNERS' INVOLVEMENT IN THE BROADER ISSUES ASSOCIATED WITH FAIR HOUSING.

(1) AS AN ASSOCIATION, APA AND OUR PREDECESSOR ORGANIZATION, AIP, ADOPTED A POLICY THAT, IN PART, STATES THAT "GOVERNMENTS AT ALL LEVELS SHOULD PROMOTE THE MAXIMUM CHOICE OF HOUSING TYPE AND LOCATION FOR ALL SEGMENTS OF SOCIETY." THIS, OF COURSE, INCLUDES FAMILIES WITH CHILDREN.

ALSO AMONG OUR ADOPTED POLICIES IS THE FOLLOWING:

"... THERE ARE INSTITUTIONALIZED BARRIERS ... IN AMERICAN SOCIETY. THE PROPOSALS DEVELOPED BY PLANNERS CAN EITHER REINFORCE THESE BARRIERS OR HELP ENSURE THAT ... SOCIAL SYSTEMS RESPOND EFFECTIVELY TO THE NEEDS OF ALL INDIVIDUALS AND FAMILIES. PLANS, POLICIES, AND PROGRAMS SHOULD WORK TO PROMOTE SOCIAL JUSTICE AND TO FACILITATE THE CHANGES NECESSARY TO ACHIEVE EQUALITY AMONG ALL CITIZENS."

(2) PLANNERS ALSO ARE VIGOROUS SUPPORTERS OF FAIR SHARE HOUSING, AND ARE RESPONSIBLE FOR PRODUCING THE PLANS THAT GUIDE FAIR SHARE HOUSING. TOWARD THAT END, LAST YEAR APA ADOPTED A "POLICY IMPLEMENTATION PRINCIPLE" ON FAIR SHARE HOUSING THAT RECOGNIZES THE PRIORITY OF FAIR SHARE HOUSING AS A PRIMARY ORGANIZATIONAL GOAL AND ADVOCATES THE REINSTATEMENT AND ENLARGEMENT OF FEDERAL INCENTIVES AND PRESSURES ON LOCAL JURISDICTIONS TO INITIATE AND ENFORCE FAIR SHARE HOUSING PROGRAMS.

(3) APA'S AMICUS CURIAE COMMITTEE ADVANCES APA'S POSITIONS IN THE COURTS. DURING 1986, THE COMMITTEE FILED A BRIEF WITH THE NEW YORK

COURT OF APPEALS IN THE CASE, STILL PENDING, OF *SUFFOLK HOUSING SERVICES VS. TOWN OF BROOKHAVEN*.

THE BRIEF, IN SUPPORT OF THE PLAINTIFF, SUFFOLK HOUSING SERVICES, ARGUES THAT LOCAL GOVERNMENTS, THROUGH THEIR LAND DEVELOPMENT REGULATIONS, SHOULD INCLUDE REALISTIC OPPORTUNITIES FOR THE CONSTRUCTION OF LOW-INCOME HOUSING TO MEET BOTH LOCAL NEEDS AND A FAIR SHARE OF THE REGION'S NEEDS FOR AFFORDABLE HOUSING.

(4) AS PLANNERS, WE WORK CLOSELY WITH DEVELOPERS AND REALTORS, BOTH GROUPS HAVING IMPORTANT ROLES IN THE PRODUCTION AND MARKETING OF HOUSING IN EXISTING AND NEW COMMUNITIES. THROUGH OUR LIAISON FUNCTION, WE ARE AWARE OF THE COMPLEXITIES THESE GROUPS FACE IN PRODUCING AND MARKETING HOUSING.

(5) MOST IMPORTANT OF ALL, PLANNERS HAVE MORE THAN A PASSING INTELLECTUAL INTEREST IN THE AMENDMENTS TO THE FAIR HOUSING ACT WHICH ARE BEFORE THE SUBCOMMITTEE TODAY. AS PROFESSIONALS, PLANNERS HAVE THE DAY-TO-DAY RESPONSIBILITY FOR DEVELOPING HOUSING ELEMENTS IN LOCAL COMPREHENSIVE OR GENERAL PLANS. THESE HOUSING ELEMENTS AFFECT THE

PRODUCTION AND SITING OF HOUSING INCLUDING HOUSING LARGE ENOUGH TO ACCOMMODATE FAMILIES WITH CHILDREN. PLANNERS ALSO PLAY THE MAJOR ROLE IN THE DRAFTING OF ZONING ORDINANCES AND SUBDIVISION REGULATIONS AT THE LOCAL LEVEL WHICH, AS YOU KNOW, CAN BE USED TO HELP OR HINDER FAMILIES WITH CHILDREN TO FIND HOUSING.

NEED FOR THIS LEGISLATION

THE CONGRESS HAS LONG RECOGNIZED THAT ALL CITIZENS DO NOT HAVE EQUAL ACCESS TO HOUSING. THE PROPOSAL TO AMEND THE FAIR HOUSING ACT TO PROHIBIT DISCRIMINATION AGAINST FAMILIES WITH CHILDREN WOULD HELP IMPROVE THAT ACCESS.

I WOULD NOW LIKE TO MAKE THE FOLLOWING POINTS OF WHY WE BELIEVE THE FAIR HOUSING AMENDMENTS ACT AND ITS PROVISION EXTENDING PROTECTION TO FAMILIES WITH CHILDREN ARE NEEDED.

OUR REASONS FOR STATING THAT THIS LEGISLATION IS NEEDED ARE:

- FAMILIES HAVE DIFFICULTY OBTAINING HOUSING

- FAMILIES WITH CHILDREN COMPRISE A MAJOR PORTION OF THE HOMELESS
- HOUSING DISCRIMINATION AGAINST FAMILIES WITH CHILDREN HAS BEEN DOCUMENTED BY THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD)
- STATE AND LOCAL STUDIES ALSO SUBSTANTIATE DISCRIMINATION AGAINST FAMILIES WITH CHILDREN
- HOUSING DISCRIMINATION HAS A NEGATIVE EFFECT ON MINORITY AND FEMALE-HEADED HOUSEHOLDS

I WILL DOCUMENT THE NEED FOR THIS BILL THROUGH SOME WORK THE APA DID FOR THE HOUSING COMMITTEE ON THE JUDICIARY IN 1984. A SUMMARY OF THIS RESEARCH, A SEVEN-PAGE ANNOTATED BIBLIOGRAPHY, IS INCLUDED WITH MY STATEMENT *

---

* This testimony also uses information presented earlier by James Morales of the National Center for Youth Law.

78-076 O - 88 - 28

- FAMILIES HAVE DIFFICULTY IN OBTAINING HOUSING

MEMBERS OF THE SUBCOMMITTEE ARE PROBABLY WELL AWARE OF THE FACT THAT OVER THE PAST TEN YEARS, MORE AND MORE AMERICANS HAVE BEEN UNABLE TO PURCHASE HOMES AND HAVE BEEN FORCED INTO THE RENTAL MARKET. FACTORS FORCING THIS SHIFT HAVE INCLUDED HIGH INTEREST RATES AND ENERGY AND INFLATION-RELATED INCREASES IN LAND PRICES AND CONSTRUCTION COSTS, TO THE POINT WHERE THE AVERAGE COST OF A NEW SINGLE FAMILY HOME IS OVER $100,000. AT THE SAME TIME THE SUPPLY OF AFFORDABLE RENTAL HOUSING HAS NOT EXPANDED TO MEET THE DEMAND. THIS HAS BEEN DUE TO CUTS IN FEDERAL FUNDS SUBSIDIZING THE CONSTRUCTION OF HOUSING FOR LOW- AND MODERATE-INCOME PEOPLE, AS WELL AS CHANGES IN TAX LAWS AND OTHER CONDITIONS MAKING MULTI-FAMILY HOUSING LESS ATTRACTIVE TO DEVELOPERS.

BESIDES THESE ECONOMIC FACTORS, THE LAST TEN YEARS HAVE SEEN A SHIFT IN DEMOGRAPHIC FACTORS AFFECTING HOUSING. MORE AND MORE BABY BOOMERS ARE POSTPONING MARRIAGE, DELAYING HAVING CHILDREN, AND ARE LIVING ALONE, OR AS COUPLES OR IN OTHER SMALL HOUSEHOLDS. AT THE SAME

TIME, MORE AND MORE PEOPLE OVER 55 ARE ENJOYING LONGER LIFE EXPECTANCIES, ALSO IN HOUSEHOLDS OF ONE OR TWO. THESE TWO GROUPS, THE BABY BOOMERS ("YUPPIES," IF YOU WILL) AND THE SENIORS, ARE COMPETING WITH LESS AFFLUENT FAMILIES WITH LARGER HOUSEHOLDS FOR WHAT IS AVAILABLE IN THE WAY OF RENTAL HOUSING. NATURALLY ENOUGH, LANDLORDS PREFER TO TAKE THE PATH OF LEAST RESISTANCE AND RENT TO SMALLER HOUSEHOLDS WHO ARE PERCEIVED TO HAVE LARGER OR AT LEAST STEADIER INCOMES AND QUIETER, LESS DISRUPTIVE LIFESTYLES. THE RESULT IS THAT THOSE PARTIES WITH THE FEWEST RESOURCES END UP WITH SUBSTANDARD HOUSING -- OR NO HOUSING AT ALL.

- FAMILIES WITH CHILDREN COMPRISE A MAJOR PORTION OF THE HOMELESS

ACCORDING TO A RECENT STUDY BY THE CENTER FOR LAW AND EDUCATION, FAMILIES WITH CHILDREN ARE THE FASTEST GROWING SEGMENT OF THE HOMELESS POPULATION IN THE U.S. NATIONWIDE THEY REPRESENT ALMOST ONE-THIRD OF THE HOMELESS. BUT IN MANY CITIES, FAMILIES WITH CHILDREN ARE IN A MAJORITY. FOR EXAMPLE, IN NEW YORK CITY THEY ARE 76% OF THE

HOMELESS; AND IN PHILADELPHIA, FAMILIES WITH CHILDREN REPRESENT 50% OF THE HOMELESS POPULATION. THE NUMBERS ARE INCREASING DUE TO THE SHRINKING SUPPLY OF AFFORDABLE HOUSING, LOWER PUBLIC ASSISTANCE BENEFITS, FAMILY BREAK-UPS, DOMESTIC VIOLENCE AND UNEMPLOYMENT.

- HUD SURVEYS HAVE DOCUMENTED HOUSING DISCRIMINATION THAT FAMILIES WITH CHILDREN FACE

THE MOST COMPREHENSIVE INFORMATION ON THE EXTENT OF HOUSING DISCRIMINATION AGAINST FAMILIES WITH CHILDREN IS FOUND IN A NATIONAL SURVEY CONDUCTED BY THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD) IN 1980. THE HUD SURVEY FOUND THAT 25.5% OF ALL RENTAL UNITS DID NOT ALLOW CHILDREN. ANOTHER 50% HAD RESTRICTIONS MAKING THEM UNAVAILABLE TO MANY FAMILIES WITH CHILDREN. THESE RESTRICTIONS INCLUDED LIMITS ON NUMBER OF CHILDREN PER UNIT, NUMBER OF UNITS PER COMPLEX WHERE CHILDREN WERE PERMITTED, REQUIREMENTS THAT CHILDREN BE OVER OR UNDER A CERTAIN AGE; AND PROHIBITIONS ON CHILDREN OF THE OPPOSITE SEX SHARING THE SAME BEDROOM.

THE HUD SURVEY ALSO FOUND THAT ONE-HALF OF FAMILIES WITH CHILDREN HAD EXPERIENCED DISCRIMINATION IN HOUSING. AS A RESULT, ALMOST 20% OF THE FAMILIES SURVEYED ENDED UP IN HOUSING THAT THEY WERE NOT SATISFIED WITH. OF FAMILIES WITH THREE OR MORE CHILDREN, THE PERCENTAGE SETTLING FOR LESS DESIRABLE HOMES ROSE TO 30%.

A FINAL POINT FROM THE HUD SURVEY IS THE FINDING THAT THE PERCENTAGE OF APARTMENT UNITS EXCLUDING CHILDREN INCREASED NATIONALLY FROM 16.7% IN 1974 TO 25.5% IN 1980. THERE IS NO REASON TO BELIEVE THAT THIS TREND OF INCREASING DISCRIMINATION HAS CHANGED. IN FACT, A 1985 NATIONAL SURVEY OF FAIR HOUSING AGENCIES HANDLING DISCRIMINATION COMPLAINTS FOUND THAT NEARLY 90% OF THE RESPONDENTS DESCRIBED HOUSING DISCRIMINATION AGAINST FAMILIES AS "SEVERE," WITH 59% CALLING SUCH DISCRIMINATION "VERY SEVERE."

- STATE AND LOCAL STUDIES SUBSTANTIATE DISCRIMINATION AGAINST FAMILIES WITH CHILDREN

TESTIMONY PREVIOUSLY PRESENTED ALSO OFFERS EVIDENCE FROM STATE AND LOCAL STUDIES. LET ME MENTION A 1979 CALIFORNIA SURVEY IN WHICH

FOUR OF THE LARGEST CITIES WERE FOUND TO EXCLUDE FAMILIES WITH CHILDREN FROM BETWEEN 50% AND 70% OF THE RENTAL UNITS.

ANOTHER CALIFORNIA SURVEY WAS CONDUCTED IN 1985, AND FOUND THAT IN ANOTHER FORM OF AFFORDABLE RENTAL HOUSING, 56% OF MOBILE HOME PARKS EXCLUDED FAMILIES WITH CHILDREN. IT HAS BEEN POINTED OUT THAT THIS DISCRIMINATION IS OCCURRING DESPITE A 1982 CALIFORNIA SUPREME COURT RULING THAT ADULTS-ONLY RENTAL HOUSING IS ILLEGAL, STRONG EVIDENCE OF THE NEED FOR FEDERAL ACTION IN THIS AREA.

BOTH THE APA ANNOTATED BIBLIOGRAPHY AND PREVIOUS TESTIMONY OFFER EXAMPLES OF SUCH DISCRIMINATION FROM OTHER STATES THROUGHOUT THE U.S. THESE INCLUDE A 1980 FINDING THAT 75% OF THE RENTAL UNITS IN THE CLEVELAND, OHIO AREA EXCLUDE CHILDREN; A 1978 FINDING NOTED THAT 60% OF DALLAS, TEXAS APARTMENTS DISCRIMINATE AGAINST FAMILIES WITH CHILDREN.

- HOUSING DISCRIMINATION HAS A NEGATIVE EFFECT ON MINORITY AND FEMALE-HEADED HOUSEHOLDS

THE END RESULT OF THIS WIDESPREAD DISCRIMINATION AGAINST CHILDREN WITH FAMILIES IN THE HOUSING MARKET IS, AS I SAID BEFORE, THAT THOSE WITH THE LEAST RESOURCES END UP IN THE LEAST DESIRABLE HOUSING.

IT SHOULD COME AS NO SURPRISE TO THE MEMBERS OF THE SUBCOMMITTEE THAT THOSE WITH THE LEAST RESOURCES ARE VERY OFTEN MEMBERS OF MINORITY GROUPS. BLACK, HISPANIC AND OTHER MINORITY HOUSEHOLDS ARE MORE LIKELY THAN WHITE FAMILIES TO HAVE CHILDREN. THEREFORE, THIS FORM OF HOUSING DISCRIMINATION AFFECTS THEM MORE FREQUENTLY.

IN ADDITION, THERE ARE RAPIDLY GROWING NUMBERS OF FEMALE-HEADED HOUSEHOLDS AND SINGLE PARENT FAMILIES WHO HAVE LIMITED MEANS AND ARE HIT HARD BY THIS FORM OF DISCRIMINATION.

FINALLY, ADULTS-ONLY HOUSING TENDS TO BE CONCENTRATED IN NEWER DEVELOPMENTS IN PREDOMINANTLY WHITE AREAS. THIS FORCES MINORITY

FAMILIES INTO NON-WHITE AREAS, THUS REINFORCING RACIALLY SEGREGATED PATTERNS OF HOUSING. THIS RESULTS IN THE PERPETUATION OF A WHOLE COMPLEX ARRAY OF PROBLEMS, NOT ONLY FOR URBAN PLANNERS, BUT ALSO FOR SOCIETY AS A WHOLE

PLANNERS' ROLE

HAVING OUTLINED PLANNERS' INTEREST IN THIS SUBJECT AND FIVE REASONS WHY HR 1158 IS NEEDED, I WOULD LIKE TO CONCLUDE WITH STATING HOW THIS WOULD ASSIST PLANNERS IN ALLOCATING SCARCE RESOURCES.

ANOTHER OF OUR MEMBERS, RITA CALVAN, WRITING AS A SPECIAL ASSISTANT TO THE SECRETARY OF HUD IN 1979 HAD THIS TO SAY:

"ANY POLICY OR PRACTICE THAT DENIES CERTAIN CATEGORIES OF PEOPLE THE OPPORTUNITY TO LIVE WHERE THEY CHOOSE SHOULD BE OF CONCERN TO MEMBERS OF THE PLANNING PROFESSION. WHILE EXCLUSION IS BOTH A MORAL AND A LEGAL ISSUE, IN PRACTICE IT FURTHER COMPLICATES THE PROCESS OF ALLOCATING SCARCE HOUSING RESOURCES SO THAT THE NEEDS OF ALL ARE MET EVEN IF WE COULD DECIDE THE DEGREE TO WHICH PEOPLE SHOULD BE PROTECTED

IN THEIR DESIRE TO INSULATE THEMSELVES FROM EVERYTHING THEY DO NOT LIKE, WE CANNOT PRESENTLY AFFORD THE LUXURY OF SO PROTECTING THOSE WHO WISH TO BE FREE OF CHILDREN. AFTER ALL, WE HAVE NEVER BEEN ABLE TO PROVIDE ENOUGH DECENT, SAFE AND SANITARY HOUSING TO SATISFY THE NEEDS OF EVERYONE."

MS. CALVAN GOES ON TO POINT OUT THE INCONSISTENCY AND INADEQUACY OF EXISTING STATE LAW IN THIS AREA. SINCE SHE WROTE IN 1979, THIS SITUATION HAS NOT IMPROVED. THEREFORE, THE NEED FOR FEDERAL LAW PROHIBITING HOUSING DISCRIMINATION AGAINST FAMILIES WITH CHILDREN IS MORE CRITICAL THAN EVER. SUCH LAW WOULD ASSIST HOUSING PLANNERS IN THEIR JOB OF "... BALANCING THE NEEDS OF ONE GROUP AGAINST THE WISHES OF ANOTHER." IT WOULD ALSO PROVIDE GUIDANCE TO OTHER PLANNERS SEEKING WAYS TO ACHIEVE DIVERSITY WITHIN THEIR COMMUNITIES.

CONCLUSION

I AM PROUD TO REPRESENT THE AMERICAN PLANNING ASSOCIATION IN SEEKING ADOPTION OF THE PROPOSED AMENDMENTS TO THE FAIR HOUSING ACT, HR 1158. IN PARTICULAR WE SUPPORT THE INCLUSION OF "FAMILIAL STATUS" AS A

PROTECTED CLASS AS A WAY TO HELP ALLEVIATE THE HOUSING CRISIS FOR THE MILLIONS OF AMERICANS CURRENTLY IN SUBSTANDARD UNITS OR, WORSE, WITHOUT HOMES ALTOGETHER. WE URGE CONGRESS TO PASS THIS LEGISLATION WHICH STANDS TO BENEFIT THE 30 MILLION, OR 40% OF ALL U.S. HOUSEHOLDS, WITH CHILDREN UNDER 18 YEARS OF AGE.

MR. CHAIRMAN, I WANT TO THANK YOU AND THE MEMBERS OF THE SUBCOMMITTEE FOR THE OPPORTUNITY YOU HAVE PROVIDED TO THE AMERICAN PLANNING ASSOCIATION TO PRESENT OUR VIEWS ON THE FAIR HOUSING AMENDMENTS OF 1987. WE WOULD BE GLAD TO WORK WITH YOU AND YOUR STAFF AND ANSWER ANY QUESTIONS THAT YOU MIGHT HAVE.

American Planning Association
1776 Massachusetts Ave. NW
Washington, DC 20036
Phone 202 872 0611

HOUSING DISCRIMINATION AGAINST FAMILIES WITH CHILDREN

Documentation of examples of discrimination and Bibliography

Requested of the

American Planning Association

by the

Committee on the Judiciary

U.S. House of Representatives

98th Congress, Second Session

Compiled by:

Allison Hamm, Attorney-at-Law

May 1984

For further information, contact:

George T. Marcou, AICP
Deputy Executive Director

Nancy P. Schamberg, AICP
Director of Government Affairs

Housing Discrimination Against Families with Children

In recent years, several trends in housing have combined to create a situation of extreme hardship for many families with children.

Since the late 1970s, 1- and 2- person (adult) households have constituted over 50% of all households in the United States. This figure shows a 40% increase over that of 1960. (Biblio. 23 at 2).

Many of the persons in these adult households, particularly elderly and young childless adults, are currently asserting the right to choose a child-free lifestyle. Their interests are being recognized in many segments of the housing market. Rental units and mobile home parks are proclaiming themselves "adult only" or are permitting restricted access to families with children. Condominium associations are drawing up age-restrictive covenants. Moreover, local governments are creating zoning districts with age-restrictions or limits as to number of persons per unit.

Families with children are confronted with these exclusionary policies in a housing market in which costs are soaring and vacancy rates in lower cost housing are already near zero. As a result, many families are forced to live in inadequate and often extremely crowded housing, often leading to numerous social costs. Moreover, studies have shown a particularly harsh impact on minorities and women resulting from this form of housing discrimination.

It is time for a serious review of policy considerations. It has been noted that the right to freely use one's property is not absolute but "is qualified by the rule of common law that . . . one must use his property in such a manner . . . as not to infringe the legal rights of another." (Biblio. 7 at 342).

It is time to state affirmatively that housing discrimination against families with children will no longer be tolerated. The material contained in the following pages states a strong case for the implementation of a federal law prohibiting this form of housing discrimination.

Discrimination in Rental Housing

Nationwide Data

-- The demand for rental housing is increasing due, in great part, to the rising cost of housing. In 1978, a representative of a building owners and managers association estimated that only 5% of the population could afford a new home and only 22% a new townhouse. (Biblio. 7).

-- About 35% of all families depend on rental housing. (Biblio 20).

-- The increase in demand, as well as a decline in construction, has created a nationwide shortage in rental housing. The vacancy rate reached a 24 year low of 4.8% during the last quarter of 1980. (Biblio. 26).

-- The shortage is even more acute for families with children. A 1980 study found that children were totally barred from 25% of all rental units, nationwide, and that only 25% of the units permit unrestricted access for families with children. (Biblio. 21 at P8).

-- Landlords are increasingly resorting to the exclusion of children from their rental units. Between 1974 and 1980, the number of units totally barring children increased, nationwide, from 17% to about 25%. (Biblio. 8 at 3).

-- The Fair Housing for Children Coalition in Santa Monica, Ca., in 1980 reported complaints from almost every state. Thus, the problem is nationwide and requires a nationwide solution.

Statistics from Around the Country

-- New York State. A 1980 report by the N.Y. Attorney General found the following: The housing vacancy rate is critically low in various parts of the state with new construction unresponsive to larger households. Restrictions based on children are having a devastating effect on New Yorkers' abilities to house their children. These restrictions are especially harsh on single-parent and minority families, as these families are almost twice as likely to rent as other families. (Biblio. 4 at 2).

-- Arlington, Va. The Fair Housing Council of Arlington reported that discrimination against children is the second biggest complaint received in their office.

-- Alexandria, Va. A recent survey found that half the apartment units in Alexandria had some kind of restriction regarding child habitation. (Biblio.21 at P8). Such restrictions can take many forms, from specific age restrictions, to occupancy limits, to restricted areas for the use of families with children.

-- Atlanta, Ga. 26% of the apartment units surveyed in a recent study barred children. 25% accepted children with restrictions. (Biblio. 19).

-- Cleveland, Oh. In a 1980 study, it was estimated that 75% of the rental units in the greater Cleveland area bar children. (Biblio. 16).

-- Chicago, Il. Even with an antidiscrimination law on the books, Chicago newspapers continued to advertise rentals where no children were allowed. A 1975 survey of Chicago newspapers revealed that 16% of the advertisements contained "evidence of discriminatory preferences against persons with children under fourteen years of age." (Biblio. 15 at 75).

-- Dallas, Tx. A 1978 study showed that 60% of the apartments were closed to children. (Biblio. 26 at 1834).

-- Norman, Ok. A 1983 telephone survey found 41% of the rental units available to children with restrictions and only 25% available with no restrictions. (Biblio. 22 at 2).

-- Palo Alto, Ca. In 1980, the vacancy rate was under 1% and only 25% of the units surveyed would rent to families with children under 16 years of age. (Biblio. 23).

-- Los Angeles, Ca. A 1980 survey found that only 14% of the apartments in Los Angeles allowed children of all ages, with no restrictions. (Subsequent to this survey, a local antidiscrimination statute was enacted.) (Biblio. 12).

Other Areas of Discrimination in Housing: Mobile Homes and Condominiums

Mobile Homes

Interest in manufactured housing, and mobile homes in particular, has surged greatly in recent years--the greatest attraction being low cost and low maintenance. The trend appears strongest in California and, therefore, it is in California that the repercussions for families with children have become most apparent.

-- In 1983, the mobile home was the fastest growing segment of the California housing stock. The vacancy rate however was only 3.5%. (Biblio. 11 at 1).

-- Many mobile home parks are seeking to attract primarily the elderly. In a state-wide study of mobile home parks, 63% of the parks surveyed expressly stated that they were "adult-only." (Biblio. 10 at 2).

-- This same study revealed that among all mobile home park residents surveyed only about 4% were under eighteen years of age; and only 2% under six. (Biblio. 10 at 40).

-- Families with children are encountering extreme difficulties in finding mobile home housing. Their frustrations are manifested through a growing number of lawsuits in which current or prospective residents are challenging age-restrictive policies of mobile home parks. (Biblio. 11 at 6).

-- The increased demand for affordable housing by families along with significant changes in the design of mobile homes make the exclusionary practices of some park owners all the more unfair and detrimental to the welfare of society." (Biblio. 11 at 7).

Condominiums

Catering to the elderly or to young single professionals, many condominiums have age-restrictive rules or covenants. As a result, families with children have been greatly excluded from this segment of the housing stock.

-- In Arizona it is a criminal offense to rent or lease property in violation of a restrictive covenant against the sale of such property to persons with children. (Biblio. 27 at 817).

-- "In Connecticut's small towns and suburbs, over half of the condominium units priced under $100,000 are 'adult oriented'." (Biblio 13 at 34).

-- "Where the courts have considered the validity of age-restrictive covenants, they have upheld the authority of condominium associations to restrict occupancy on the basis of age." (Bibio. 14 at 178).

Zoning, Restrictive Covenants, and the Courts

Special housing interests such as the elderly and young childless adults have encouraged nationwide promulgation of local zoning ordinances and of restrictive covenants barring residents under a certain age or limiting the number of persons permitted per unit.

-- Age-restrictive zoning ordinances to promote housing interests of the elderly are being upheld in courts around the country. (Biblio. 14 at 178). A review of the cases suggests that age-restrictive zoning for "non-elderly adults" may also get through the courts without difficulty. (Biblio. 27 at 816).

-- "Where the courts have considered the validity of age-restrictive covenants, they have upheld the authority of condominium associations to restrict occupancy on the basis of age." (Biblio. 14 at 178). This is so, regardless of a strong argument that such enforcement of restrictive covenants involves "state action." (Biblio. 6 at 587).

-- Some zoning ordinances are "specifically aimed at excluding or limiting children from new developments to prevent large increases in the number of school children." This would enable the local government to "maintain educational standards without increasing property tax rates." (Biblio. 6 at 564). While most courts have disallowed zoning based solely on such a fiscal motivation, at least one court has held that school financial problems "may be considered in weighing the comparative benefits upon the public and private landlord." (Duggan v. County of Cook, 60 Ill.2d 107, 324 N.E. 2d 406 (1975)) (Biblio. 6 at 598).

Government Housing Programs

Government assisted housing projects have perpetuated housing discrimination against families with children.

-- "In the last twenty-five years, government housing programs in Connecticut have produced more elderly housing than family housing. In the last five years, three times as many publicly assisted housing units were built for the elderly as for families." (Biblio. 17 at 6). (footnotes omitted)

Costs of Discrimination

-- "Child Ghettos": Research has found that "widespread exclusionary practices cause 'clustering' of families with children, which in turn causes distortion of community needs for schools and recreational facilities." (Biblio. 2 at 29).

-- Families with children now face problems victims of other forms of housing discrimination have always faced, including "inferior education, reduced proximity to employment, loss of neighborhood relationships and contact, social embarrassment and other personal, business and social consequences." (Biblio. 15 at 65).

-- "Denial of adequate housing through discriminatory practices forces a large number of families into substandard, overcrowded facilities." (Biblio. 6 at 561).

-- There is evidence of a social cost to children who are victims of discrimination, in that they perceive themselves as responsible for their families' housing problems. (Biblio 26).

-- Examples of the costs of discrimination:

- a Cincinnati mother who was forced to leave her apartment had to seek a foster home for her ten year old son. (Biblio. 18).

- a divorced woman in Palo Alto, California, had to transfer custody of two of her three children to her former husband when she could not find a suitable apartment. (Biblio. 18).

- a divorced tenant was told to look for housing elsewhere after he informed the managers of his apartment complex that some of his eight children might be visiting him from time to time. (Biblio. 1).

Impact of Discrimination on Women and Minorities

Discrimination against families with children has had an especially harsh impact on female-headed families and minorities:

-- 14% of all families in the United States are headed by women. (Biblio. 25 at 4).

-- About 70% of all households headed by women live in poverty. These families cannot afford home ownership and many rental units are above their means. (Biblio. 9 at 5).

-- 53% of female-headed households rent housing as opposed to 35% of the general population. (Biblio. 25 at 7).

-- A 1977 study showed that black families with children were more than twice as likely as other families to be renting. (Biblio. 3).

-- A HUD study found that 21% of black families and 18% of Hispanic families were living in housing units with physical deficiencies in 1976. These rates are almost twice those of white families. (Biblio. 5 at 3-3).

-- With the combination of lower incomes to work with and "no children" policies in rental housing to contend with, the affordable rental housing supply is just about negligible for minority and female-headed families. (Biblio. 5 at 5).

List of Works Consulted

1. "Apartment Bans on Children Widespread--and Illegal," Chicago Tribune (July 28, 1982), sect.1, 15:1.

2. Ashford and Eston, The Extent and Effects of Discrimination Against Children in Rental Housing: A Study of Five California Cities (December 1979) (Fair Housing Project, Santa Monica, CA).

3. Bureau of the Census, U.S. Department of Commerce, Annual Housing Survey: 1977. General Housing Characteristics, Part A, Series H-150-77 (September 1979).

4. Discrimination in Rental Housing Against Families with Children, Report of the Attorney General of New York (February 1983).

5. Golubock, C., Housing Discrimination Against Families with Children: A Growing Problem of Exclusionary Practices, (Childrens Defense Fund).

6. "Housing Discrimination Against Children: The Legal Status of a Growing Problem," Journal of Family Law, vol. 16 (1978), 559-607.

7. "Housing Discrimination Against Families with Children: A National Concern," Washburn Law Journal, vol. 20 (1981), 307-325.

8. Marans, M. Colten, et. al., Measuring Restrictive Rental Practices Affecting Families with Children: A National Survey (July 1980) (prepared for Office of Policy Development and Research, U.S. Department of Housing and Urban Development by the Survey Research Center, Institute for Social Research, University of Michigan).

9. Marshall, S., Women with Children in Today's Housing Market (September 1983) (prepared for the U.S. Commission on Civil Rights).

10. Mobilehome Parks in California: A Survey of Park Operators and Tenants, 1977-78, California Department of Housing and Community Development (1978).

11. Morales, J., "Mobilehome Parks in California: Last Stand for Age-Restrictive Housing Policies?," Youth Law News, vol. 4, nos. 5 & 6 (November/December 1983).

12. Muse, P., "Compact Living: Tenants are Fighting Restrictions on Children," Baltimore Evening Sun (January 30, 1980).

13. Netter, E., "Children: An Endangered Species," Urban Land, vol. 42, no. 10 (October 1983), 34-5.

14. Netter, E., and R. Price, "Zoning and the Nouveau Poor," American Planning Association Journal (Spring 1983), 171-81.

15. O'Brian and Fitzgerald, "Apartment for Rent--Children not Allowed: The Illinois Children in Housing Statute--Its Viability and a Proposal for its Comprehensive Amendment," De Paul Law Review, vol. 25 (1975), 64-101.

16. Open Housing Report, Cuyhoga Plan of Ohio (August 1980).

17. Price, R. "Housing as a Preventive Service," (Connecticut Department of Housing) (November 1981).

18. "Protests are Mounting over 'Adults Only' Rentals," U.S. News and World Report (February 4, 1980), 58.

19. Reid, Keating and Long, Patterns of Discrimination Against Children in Rental Housing in the Metro-Atlanta Area (January 1979) (prepared for the U.S. Department of Housing and Urban Development).

20. Rental Housing: A National Problem that Needs Immediate Attention, U.S. General Accounting Office, Report to the Congress by the Comptroller General of the United States, CED-8011 (November 8, 1979).

21. "Renters with Children Target of Illegal Bias," Washington Post, (December 11, 1982), F1, F8.

22. Saint, J., Rental Practices Affecting Families with Children: Norman, Oklahoma Survey (January 1983) (Report to the Norman Human Rights Commission by the Metropolitan Fair Housing Council of Greater Oklahoma City).

23. Simms, M., Families and Housing Markets: Obstacles to Locating Suitable Housing (September 1980) (prepared for Office of Policy Development and Research, U.S. Department of Housing and Urban Development, by the Urban Institute).

24. Telephone Survey (November 1981) (Mid-Peninsula Citizens for Fair Housing, Palo Alto, CA).

25. U.S. Department of Housing and Urban Development, How Well are We Housed? 2. Female-Headed Households (1978).

26. Why Johnny Can't Rent--An Examination of Laws Prohibiting Discrimination Against Families in Rental Housing," Harvard Law Review, vol. 94 (1981), 1829-49.

27. "Zoning for Direct Social Control," Duke Law Journal, vol. 1982, no. 5 (1982), 761-845.

June 22, 1987

The Honorable Paul Simon, Chairman
Senate Subcommittee on the Constitution
of the Committee on the Judiciary
462 Dirksen Senate Office Building
Washington D.C. 20510

Dear Senator Simon:

The Association for Retarded Citizens of the United States is writing to urge your support for the Kennedy-Specter substitute for S. 558, the Fair Housing Amendments Act. Our Association has been an active supporter of the Subcommittee's efforts to fashion a bill that will appropriately meet the needs of people with mental retardation and other disabilities. The bill coming before the Subcommittee tomorrow truly will provide the protections necessary to assure access to housing in the future to 36 million Americans with disabilities.

Your continued support for the provisions clarifying access requirements in new construction is greatly appreciated as the bill moves forward. Our organization stands ready to offer any additional assistance as you continue this very important undertaking. Thank you for your on-going concern with the needs of people with disabilities.

Sincerely,

V. K. "Warren" Tashjian
President

arc National Headquarters 2501 Avenue J Arlington, Texas 76006 (817) 640-0204
Association for Retarded Citizens of the United States

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
ONE NEW YORK PLAZA - NEW YORK, N.Y. 10004-1980

SUITE 800
1001 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004
(202) 639-7000
TELEX 892406
FAIRFAX (202) 639-7008

725 SOUTH FIGUEROA STREET
LOS ANGELES, CALIFORNIA 90017-5430
(213) 689-5800
TELEX 65729610
FACSIMILE (213) 689-5440

(212) 820-8000
CABLE "FRIEDRICH NEW YORK"
TELEX
ITT 66[illegible]
RCA [illegible]
WU 62[illegible]
WU 20[illegible]
FACSIMILE
VERDX (212) 747-1525
RAPICOM (212) 747-1526
DFX 212-269-2844
WRITER'S DIRECT LINE

5 KINGS ARMS YARD
LONDON, EC2R 7AD ENGLAND
011-44-1-600-1414
TELEX 887600
CABLE "FOLGAT LONDON EC2"
FACSIMILE
011-44-1-606-9416

820-8151

April 17, 1987

Deborah Levy, Esq.
Subcommittee on Constitutional
and Civil Rights
Committee on the Judiciary
United States Senate
Dirksen Office Building
Washington, D.C

Re: Hearings With Respect To S.558

Dear Mr. Levy:

I understood that it was impossible to schedule my testimony before the Subcommittee with respect to the proposed Fair Housing Amendments Act of 1987 (S.558). I would appreciate if the enclosed statement concerning the insurance redlining provisions of the bill could be included in the record.

In the enclosed statement I urge the Committee to include insurance redlining prohibitions in the bill as such a clarification of existing law could be an important weapon to counter a significant fair housing and community development problem. I suggest that the Committee consider the broader language contained in the House version of the Fair Housing Act Amendment of 1980 in order to make the weapon more potent.

If you have any questions concerning the enclosed statement, please do not hesitate to contact me.

Sincerely,

David I. Badain

DIB/pm
Enc.

STATEMENT OF DAVID I. BADAIN CONCERNING INSURANCE REDLINING PROVISIONS OF S.558

Seven years ago, I prepared a comprehensive study of insurance redlining and its impact on the societal goal of vital integrated urban neighborhoods. The study, a copy of which I have annexed as Appendix I, concluded that (i) the practice of insurance redlining was widespread, (ii) it had an undeniable racial impact and (iii) given the nexus between affordable insurance and the financing of housing, insurance redlining was a substantial obstacle to the revitalization of the urban core and the success of federal fair housing and community development policy goals. As the states have not been able to control the redlining crisis for a variety of reasons, federal action was essential to overcome a very fundamental problem.

The study proposed comprehensive changes in the regulation of the insurance industry in order to address the redlining crisis. It also concluded that application of the Fair Housing Act could be an effective weapon to help control redlining. Application of the Fair Housing Act in this manner would be consistent with the history and goals of the Act. Title VIII was enacted amidst the ashes of the urban riots of the mid-1960s, and Congress was well aware of the problems of urban deterioration that had been caused in part by redlining practices, and of the impact of these practices in limiting housing opportunities for the poor and urban minorities.

The study supported the findings of the federal district court in Dunn v. Midwestern Indemnity,[1] which affirmed the use of Title VIII to combat insurance redlining. The court in Dunn employed a well-reasoned combination of legislative history and administrative interpretations, together with synthesis of numerous cases which make clear that the Fair Housing Act regulates not only the direct sale and rental of housing, but also a wide variety of other practices that "make unavailable or deny" housing opportunities and thus frustrate the goal of racially integrated neighborhoods.[2]

---

1. 472 F. Supp. 1106 (S.D. Ohio, 1979)

2. These practices include racial steering, blockbusting, discriminatory newspaper advertisements, the rejection of minority orphans by an orphanage, racially exclusive land use policies, discriminatory appraisal practices and the

Footnote Continued

Indeed, as the Supreme Court has unequivocably stated, the Fair Housing Act seeks to replace ghettoes with "truly integrated and balanced living patterns" and that in construing the Act, it is necessary to afford its provisions a "generous construction."[3]

Despite the strong legislative history, the judicial tendency to give a broad construction to the Fair Housing Act, favorable administrative interpretations and the Dunn case, seven years after the completion of the study I nevertheless believe it is important that the Fair Housing Act be amended to codify Dunn and explicitly prohibit insurance redlining.

The first reason is the continuing nature of the redlining crisis. Although public attention has shifted in the past seven years from redlining to other insurance availability and affordability issues, I have seen little to change my basic conclusions concerning the magnitude of the redlining problem, its devastating impact on fair housing goals and the need for federal action to overcome the problem. An explicit prohibition of insurance redlining would raise the public consciousness of the issue and make the industry think more carefully about practices which may go beyond the prohibited line. I agree with the Secretary of HUD Harris when she described proposed insurance redlining amendments in 1980 as "helpful and necessary. While there are strong indications that such conduct is reached by the existing law, the more explicitly the statute addresses these issues, the more certain we can be that potential violators are fully aware of the conduct prohibited. In addition, victims of such conduct could more easily secure redress in the courts if the law clears away doubts as to the extent of its coverage."

The second reason is that the waters have been muddied somewhat by the Fourth Circuit Court of Appeals in Mackey v. Nationwide Insurance Cos.[4] Mackey went against the thrust of

---

2. Footnote Continued From Previous Page

withdrawal of a city's application for community development funds in an attempt to maintain segregated housing and mortgage redlining.

3. Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 211, 212 (1972).

4. 724 F.2d 419 (1984)

Title VIII cases by taking an extremely narrow interpretation of the initial intent of the Act and by the court's reliance on past unsuccessful attempts to amend Title VIII to explicitly include insurance redlining as the proof its thesis (even though these amendments were identified by their proponents as merely clarifying in nature). Although the two courts which have examined the Mackey rationale have rejected it,[5] I am concerned that the progeny of Mackey would deem any failure by Congress to adopt these amendments in 1987 as an endorsement of its narrow interpretation of the Fair Housing Act.

The third reason is that while insurance redlining is potent in its effect is often subtle in its form. Broadly worded legislation supported by appropriate back-up in a committee report, can be more effective against the multi-faceted forms of redlining than the case-by-case approach of litigation. On one basic level, the facts of Dunn merely involved the blatant refusal to insure an individual solely on the basis of the applicant's race. But this does not get at the heart of the redlining problem - all institutional practices of the insurance industry which have the effect of limiting the availability or affordability of insurance in certain neighborhoods, except to the extent that there is a direct causal relationship to an increased probability of loss. This broad approach is best implemented by statutory action and is consistent with the policy goals of Title VIII as enunciated by the Supreme Court in Trafficante: to protect all persons, white as well as black, from the "loss of important benefits of racial association."[6]

Accordingly, I also urge the Committee to consider adopting the language that appeared in the House version of the Fair Housing Act Amendments of 1980 (which I have annexed as Appendix II), which also would have prohibited discrimination in the provision of hazard insurance on the basis of the race, color, religion, sex, handicap or national origin of persons owning, residing in or near, the dwelling as a more effective broad-brush approach to the redlining problem. I would also urge you in the committee report to make clear that a disparate impact approach should be applied in examining industry practices as the racial attitudes behind many practices are

---

5. McDiarmid v. Economy Fire & Casualty Co., 604 F. Supp. 105 (S.D. Ohio, 1984) and State of Md. v. Blue Cross and Blue Shield, 620 F. Supp. 907, 916-917 (D.C. Md. 1985).

6. 409 U.S. at 209-210.

garbed in facially plausible seemingly reasonable "neutral factors".

Almost two decades ago, the President's National Advisory Panel on Insurance Availability observed:

> "[insurance] is a cornerstone of credit. Without insurance, banks and other financial institutions will not - and cannot - make loans. New housing cannot be constructed, and existing housing cannot be repaired. Without insurance, buildings are left to deteriorate...efforts to rebuild our nations cities cannot move forward. Communities without insurance are communities without hope."

While the urban landscape has changed much in the last twenty years, the vital role of insurance and the devastating role of insurance redlining has not. I urge the Committee to further the goal of fair housing by making clear that insurance redlining is an activity proscribed by the Fair Housing Act.

APPENDIX I

Insurance Redlining and the Future of the Urban Core

David I. Badain*

I. Introduction

Few services are as important to modern society as property insurance. The pooling of loss experience by the insurance industry counteracts the individual's inability to predict catastrophic loss and spreads risks throughout society. The collection of premiums enables insurance companies to become the conduits through which property owners, who individually lack resources, can rebuild in case of loss. Because property insurance is a prerequisite for the credit upon which our society is based, it is a necessity for residential and business property ownership. Thus, insurance is a social good "essential to personal security and community growth"[1] and the industry has become among the most regulated in our economy.[2]

The problem of property insurance unavailability "is not one which randomly affects isolated individuals but rather strikes at residents of older urban communities."[3] Since the mid-1960s, the public has grown more cognizant of the relationship between the unavailability of property insurance and urban decline. Precipitating this awareness were the riots that shook Detroit, Newark, Los

---

* This article is based on a paper written by the author, a staff member of the Colum. J.L. & Soc. Prob., and Melanie N. Aska, New York University Law School 1983, during their graduate studies at the Woodrow Wilson School of Public and International Affairs, Princeton University (Spring 1979) and a policy memorandum on insurance redlining written by Ms. Aska for Robert C. Embry, Jr., Assistant Secretary for Community Planning & Development, U.S. Dep't of Housing & Urban Development (August 1979). Ms. Aska collaborated on earlier drafts of this article until March 1980.

1. U.S. Comptroller General, Issues and Needed Improvements in State Regulation of the Insurance Business 143 (General Accounting Office, 1979) [hereinafter cited as GAO Report].

2. The purposes of regulation are four-fold: to monitor the financial health of the industry; to maintain public confidence through minimizing the risks of insolvency; to ensure that rates are neither excessive nor inadequate; and to prevent unfair discrimination. *Id.* at 13-14. This regulation has traditionally been a state function (*see* notes 92-105 and accompanying text *infra*) and has come under increasing attack by both the industry and its critics in recent years.

3. Ill., Ind., Mich., Minn., Ohio, & Wis. Advisory Comms. to the U.S. Comm'n on Civil Rights, Insurance Redlining: Fact Not Fiction 1 (1979) [hereinafter cited as Midwest Civil Rights Advisory].

Angeles and other troubled cities during that era. Anticipating serious losses from the wave of disorders and facing a constriction in the availability of private riot reinsurance,[4] insurance companies threatened to pull entirely out of central cities. The President's National Advisory Panel on Insurance Availability (Hughes Panel)[5] was commissioned to examine the causes and effects of inner-city insurance unavailability and to devise a solution to this dilemma. The Panel determined that the problem threatened the viability of the inner-city housing market. It observed that insurance

> is a cornerstone of credit. Without insurance, banks and other financial institutions will not—and cannot—make loans. New housing cannot be constructed, and existing housing cannot be repaired. Without insurance, buildings are left to deteriorate . . . [e]fforts to rebuild our nation's cities cannot move forward. Communities without insurance are communities without hope.[6]

Because of the urgency of this problem, Congress quickly adopted the Hughes Panel's recommendations in the Urban Property Protection and Riot Reinsurance Act of 1968 (UPPRA).[7] Nevertheless, complaints of "insurance redlining" have intensified in recent years.[8] In 1978, the Federal Insurance Administration

---

4. President's Nat'l Advisory Panel on Ins. in Riot-Affected Areas, Meeting the Insurance Crisis of Our Cities 35-40 (1968) [hereinafter cited as Hughes Panel]. Reinsurance is "insurance of insurance." R. Mehr & E. Cammack, Principles of Insurance 586 (6th ed. 1976). State law establishes maximum ratios between company resources and the total amount of policies written (*i.e.*, surplus-to-premium ratios). Companies approaching that limit may seek to reinsure portions of certain policies. Similarly, a company may seek reinsurance where its exposure in a particular line or area is considered excessive. Reinsurance may be for individual policies, for all policies in excess of a certain limit, for losses in excess of a specified limit or for particular catastrophes (*e.g.*, riots). *See generally id.* at 585-89.

5. The Panel, chaired by New Jersey Governor Richard Hughes, was a subgroup of the President's National Advisory Commission on Civil Disorders.

6. Hughes Panel, *supra* note 4, at 1.

7. *See* notes 31-38 and accompanying text *infra*.

8. Mail survey of state insurance departments conducted by David Badain (Summer 1980) (on file with Colum. J.L. & Soc. Prob.) [hereinafter cited as *1980 JLSP Survey*]. The following departments indicated that they had received redlining complaints from community groups: Illinois, Indiana, Iowa, Michigan, Missouri and Minnesota. Colorado, Kansas and Wisconsin reported only individual complaints; the former two categorizing these complaints as "scattered." Georgia and Montana stated that although complaints had been received, these were ultimately found to be groundless. No complaints were reported by Florida, Hawaii, Idaho, Louisiana, Maine, Mississippi, Nebraska, Nevada, North Carolina, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia and Wyoming. Alaska indicated that rural redlining problems once existed and have been

(FIA)[9] concluded that despite the Act, "insurance availability and insurance affordability in urban areas are crises of monstrous proportions."[10]

Pressure for reform has also come from urban community organizations,[11] which have increased public awareness of and involvement with this problem.[12] This has increased pressure on regulators for more aggressive action on the redlining issue. In turn, the industry has responded with policy statements against redlining[13] and individual companies have negotiated agreements with community groups to ensure greater insurance availability in certain neighborhoods.[14] Yet, as the FIA has documented, the problem persists.

This article will examine the nature of the redlining problem and the effectiveness of government actions that have attempted to

---

resolved.

Among the states not responding to the survey was New York, where there had been extensive complaints of redlining problems. *See* FEDERAL INS. ADMINISTRATION, U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT, INSURANCE CRISIS IN URBAN AMERICA 40-42 (1978) [hereinafter cited as INSURANCE CRISIS]. *See generally* B. MELEWSKI & M. LAMPI, WHERE DO YOU DRAW THE LINE? (New York Public Interest Research Group, Inc., 1978). Also not responding was California, where individuals complained of unavailability problems at hearings conducted by the Federal Insurance Administration. Federal Ins. Administration, Report on Redlining: Detroit, Los Angeles & Miami, Florida 8-12 (Oct. 1979) [hereinafter cited as FIA: Detroit, LA, Miami].

9. The Federal Insurance Administration was a component of the U.S. Dep't of Housing & Urban Development, until 1979, when it was transferred to the newly-created Federal Emergency Management Agency. Exec. Order No. 12,127, 44 Fed. Reg. 19,367 (1979).

10. INSURANCE CRISIS, *supra* note 8, at 44.

11. For the dynamics of the organizing process, *see generally* R. SCHACHTER, INSURANCE REDLINING—ORGANIZING TO WIN! 39-82 (Nat'l Training & Information Center, 1979).

12. An October 1978 nationwide public opinion survey, commissioned by Aetna Life & Casualty Ins. Co. and performed by Cambridge Reports, Inc., found that 43% of the respondents believed that some people with well-maintained property are unfairly turned down for property insurance. Thirty-five percent were not sure if that was true and 27% thought that it was not true. AETNA LIFE & CASUALTY INS. CO., A REPORT ON PROPERTY INSURANCE AVAILABILITY 13-15, 31-32 (1979) [hereinafter cited as AETNA REPORT]. Because redlining is essentially an older city phenomenon, it is remarkable that such a high percentage of the *general* population recognizes this problem.

13. *See, e.g.*, American Ins. Ass'n, Property Insurance & Redlining (n.d.); AETNA REPORT, *supra* note 12, at 36-40, 73-92. The latter report is an in-house study of the company's practices and an outline of possible actions to avoid redlining. The study candidly admits that one of its objectives was to develop recommendations in order to avert "costly government restrictions." *See id.* at 75, 84, 132-33, 137-38, 143, 154. Several companies have also sent memoranda to field offices and agents indicating their opposition to redlining. *See, e.g., id.* at 38-39 (Aetna); R. SCHACHTER, *supra* note 11, at 23 (Allstate).

14. *See, e.g.*, N.Y. Times, Feb. 25, 1980, § D, at 3 (Aetna advertisement); Nat'l Underwriter, Apr. 25, 1980, at 4; Balt. Sun, Apr. 14, 1980, § C, at 1. *See generally* R. SCHACHTER, *supra* note 11, at 44-53, 81.

control it. It will explore the structure and history of the industry's regulation and the constraints they place on remedial action. Proposals for administrative, judicial and legislative solutions will be evaluated. Finally, a new approach for dealing with the twin problems of unavailability and unaffordability will be explored.

II. The Problem Defined

A. The Anatomy of Insurance Redlining

1. The Broader Context. In its traditional definition, "redlining" is the outright refusal of an insurance company or lending institution to provide services *solely* on the basis of a property's geographical location. The term was derived from their former practice of outlining on a map in red those neighborhoods to be denied service.[15]

The term redlining has acquired a broader definition. It now encompasses all institutional practices which have the effect of limiting the availability or affordability of these services in certain neighborhoods, usually in older urban areas, except to the extent that there is a direct causal relationship to an increased probability of loss.[16] This definition includes some rating classifications,[17] most refusals to insure, restrictions on coverage, and territorial classification plans[18]—practices which result in higher rates for urban

---

15. In B. Melewski & M. Lampi, *supra* note 8, at 5, the authors reported finding a map of New York City that had been used by an insurance company until 1962 as an underwriting tool. Large portions of each borough were shaded in red, to indicate where only limited coverage (if any) was to be granted. *See also* Hughes Panel, *supra* note 4, at 6.

16. This broader definition is not universally accepted. The definition used by the predominantly-industry Advisory Committee to the National Association of Insurance Commissioners Task Force on Redlining excludes an adverse underwriting decision "when such action [was] based on sound underwriting and actuarial principles reasonably related to actual or anticipated loss experience." Advisory Comm. to the Nat'l Ass'n of Ins. Commissioners Redlining Task Force, Ninety Day Report 2-3 (Mar. 31, 1978) [hereinafter cited as NAIC 90 Day Report]. According to this definition, a finding of redlining turns on whether a refusal to insure was based on "sound underwriting and actuarial principles." This usage of the term, however, does not address other factors which effectively result in unavailability (*e.g.*, selective placement or termination of agents, territorial classifications, etc.) or social policy concerns.

17. Classification is the aggregation of large groups of similar risks into categories for purposes of rate determination. For example, in City X, all single-family brick houses are assigned the same rate per $100 of fire insurance; all frame dwellings are charged a different rate. *See generally* R. Mehr & E. Cammack, *supra* note 4, at 607-09.

18. Territories are geographical classifications. Factors considered in setting territorial classifications include the jurisdiction's water supply, the quality of its police and fire departments, the nature of its building laws, and any structural conditions which might lead

risks.

Redlining did not begin in the mid-1960s, nor is it the sole invention of a malevolent insurance industry. Rather, the roots of the problem are traceable to an assortment of federal housing, transportation and procurement policies in the post-war era, which have encouraged the decentralization of the American population at the expense of its older cities.[19] Property insurers, anxious to reach the growing market of suburban, upwardly mobile families in newly-constructed homes, developed the homeowners' package in the mid-1950s. The package offered built-in economies through a single indivisible premium which covered a multitude of perils (*e.g.*, fire, burglary, theft and personal liability), but was tendered only to the most desirable residential risks.[20]

Insurance is one industry whose profitability depends on "adverse selection"—*i.e.*, selling to the lowest-risk customers. This both reduces costs and maximizes profitability within a company's legal allowable surplus-to-premiums written capacity. Perceiving central city business to be riskier, insurance companies joined the exodus of the affluent and the middle class from the inner city to America's suburbs while gradually terminating or restricting the books of business of urban agents.[21] The result of the suburban out-migration was an ever-increasing unavailability of property insurance in the central city, reaching crisis proportions in some areas and precipitating a cycle of deterioration and housing abandonment. High premiums compelled inner city residents and landlords to buy only very limited coverage. Inadequate coverage forced premiums on available policies even higher. In addition, the unavailability of property insurance forced lending institutions to curtail mortgage activity in certain neighborhoods.[22]

Once started, this cycle of disinvestment fed upon itself:

> As insurance became increasingly difficult to obtain or . . . afford . . ., vacated properties remained vacant since willing buyers could not obtain loans for want of insurance to secure such loans;

---

to a general conflagration. *Id.*

19. *See generally* CONGRESSIONAL QUARTERLY, INC., URBAN AMERICA: POLICIES & PROBLEMS 6-7 (1978); THE PRESIDENT'S 1978 NATIONAL URBAN POLICY REPORT 101-02 (1978). The role of other segments of the real estate industry will be discussed in notes 193-98 and accompanying text *infra*.

20. For a discussion of the history of the redlining problem, *see* INSURANCE CRISIS, *supra* note 8, at 4-6.

21. *Id.* at 4.

22. *Id.* at 5.

> properties urgently in need of repair . . . declined further as credit for such purposes could not be obtained in the absence of insurance availability.[23]

A consensus for action was sparked by the violent mid-1960s urban riots and the concomitant threat of massive disinvestment by insurance companies. Yet, as concluded by the Hughes Panel's January 1968 report, the riots were one cause of an "inner city insurance problem that [was] broad in scope and complicated in origin."[24] Widespread refusals to insure occurred even where there had been no riots and where none were threatened.[25] These were based primarily upon neighborhood characteristics, most significantly racial composition, without regard to the merits of the particular risk.

The Panel found an industry that exaggerated its urban loss experience and manifested its view in underwriting manuals warning of excessive inner city risks. As these views were accepted by underwriters[26] and agents, insurance in these areas became less readily available, and the cycle of deterioration continued. The result was a self-fulfilling prophecy imperiling well-maintained urban homes and integrated neighborhoods. The Panel anticipated an exodus of those urban policyholders who could afford to relocate in the suburbs and warned that "[t]hose who don't move will have less incentive to keep up their properties. Insurance must be made available now."[27]

The Panel found the industry's fear of riots and concomitant catastrophic losses to be the primary cause of the availability cri-

---

23. Federal Ins. Administration, U.S. Dep't of Housing & Urban Development, Full Insurance Availability 24 (1974) [hereinafter cited as Full Insurance Availability].

24. Hughes Panel, *supra* note 4, at 3-7.

25. Indeed, insured property losses from the 1967 riots totaled less than $75 million, a figure dwarfed by the $715 million loss which Hurricane Betsy left in its wake in 1965. The riots accounted for less than 3% of total property losses for 1967. *Id.* at 4. The industry withdrew from cities where rioting had been moderate or minor, such as St. Louis and Oakland, as well as those cities where it had been severe, such as Detroit and Newark. Industry statements notwithstanding, the urban pullout was not tied to the intensity of the unrest. The Panel concluded that "riots [were] only one aspect" of the availability crisis. *Id.* at 5. But, as Robert Works explains, "[w]hat the riots did produce was a loss of faith in the efficacy of past experience as a guide to future losses." Works, *Whatever's FAIR — Adequacy, Equity and the Underwriting Prerogative in Property Insurance Markets*, 56 Neb. L. Rev. 445, 492-93 (1977).

26. Insurance companies employ underwriters who review risks submitted by agents and determine whether the company will accept the application. *See generally* R. Mehr & E. Cammack, *supra* note 4, at 579-85.

27. Hughes Panel, *supra* note 4, at 8.

sis.[28] Hence, it recommended that the federal government offer non-cancelable low-cost riot reinsurance to companies participating in Fair Access to Insurance Requirements (FAIR) plans.[29] These would be state-designed, federally-approved programs to cover all "insurable risks" that had been denied coverage in the voluntary market.[30]

2. *FAIR.* As noted above, the Hughes Panel recommendations were not relegated to the safe obscurity of an executive file cabinet. The immediacy of the riots spurred Congress to pass the three great housing acts of 1968—the Housing and Urban Development Act of 1968,[31] Title VIII of the Civil Rights Act of 1968 (the "Fair Housing Act"),[32] as well as the Urban Property Protection and Riot Reinsurance Act of 1968 (UPPRA).[33] Consistent with the Hughes Panel's recommendations, UPPRA mandated that approved state plans offer insurable risks[34] at least "essential prop-

28. *Id.* at 2-7.

29. *Id.* at 7-8. The plan was modeled after local initiatives in Boston (1960), Pennsylvania (1965), Detroit (1966), Cleveland (1966), New York City (1967) and Buffalo (1967). *See id.* at 56-79, and Works, *supra* note 25, at 484-91. For a discussion as to why a more dramatic federal solution was not suggested, see notes 92-172 and accompanying text *infra*.

30. In the voluntary market, coverage is offered by a voluntary insurer (*i.e.*, one who provides insurance on a voluntary basis, as opposed to being required to do so by law, as under the FAIR plan or auto assigned risk pool). The FAIR plan may be described as servicing the residual market, *i.e.*, those risks not covered by the voluntary market. *See* U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT, INSURANCE REDLINING: A GUIDE FOR ACTION 14 (1979) [hereinafter cited as HUD REDLINING ACTION GUIDE].

31. The Housing and Urban Development Act of 1968, Pub. L. No. 90-448, 82 Stat. 476, declared that the failure to meet the three-decade old goal of "'a decent home and a suitable living environment for every American family' [enunciated in the Housing Act of 1949, 42 U.S.C. § 1441 (1976), was] a matter of grave national concern" (12 U.S.C. § 1701t (1976)) and set a ten-year goal: the construction or rehabilitation of twenty-six million housing units, six million of these for low- and moderate-income families. 42 U.S.C. § 1441a (1976). An ambitious series of housing assistance programs was initiated to meet these goals: homeownership assistance for low- and moderate-income families (§ 235 program); housing in declining neighborhoods (§ 223(e) program); mortage insurance for high-risk mortgagees (§ 237 program); assistance to non-profit sponsors of low- and moderate-income housing (§ 106 program); rental and cooperative assistance for lower-income families (§ 236 program); supplemental loans for multifamily projects; the New Communities Program; GNMA guaranteed mortgage-backed securities and mortgage purchases. 12 U.S.C. §§ 1701(x), 1715(z) (1976).

32. 42 U.S.C. §§ 3601-3619 (1976).

33. 12 U.S.C. §§ 1749bbb to 1749bbb-21 (1976 & Supp. III 1979). This piece of legislation was actually part of the Housing and Urban Development Act of 1968, Pub. L. No. 90-448, 82 Stat. 476. At the time, one influential commentator argued that the new law was "the most significant insurance legislation adopted in this century." Denenberg, *The Federal Reinsurance Program*, Best's Ins. News (Prop. & Liability ed.), Oct. 1968, at 28.

34. The Act was silent on the definition of "insurable" and "uninsurable" properties.

erty insurance," defined by the Act to include standard fire and extended coverage[35] and other forms of insurance which the Secretary of HUD deemed essential.[36] The presence of "environmental hazards"—*i.e.*, those conditions beyond the control of the property owner or tenant—were not to be considered under approved plans.[37]

It was widely believed at the program's inception that FAIR plans would make basic, reasonably-priced property insurance available to all "insurable risks." Indeed, FAIR plans have made basic property insurance, and indirectly, mortgage credit, available to millions of inner-city residents who would have been denied both in the voluntary market.[38]

FAIR plans, however, have not operated in the way envisaged by UPPRA's proponents in 1968. The atmosphere of the late 1960s led to the adoption of approved plans in twenty-six states,[39] Puerto

---

It merely stated that no risk was to be written at surcharged rates or denied essential property insurance unless an inspection revealed that the risk did not meet "reasonable underwriting standards at the applicable premium rate." 12 U.S.C. § 1749bbb-3(b)(1) (1976). Hence, the states were left much discretion in determining eligibility. Nevertheless, all FAIR plans exclude properties which are vacant and open to trespass, properties in poor physical condition (including unrepaired fire damage) and properties which are used in violation of law or public policy. Twenty states disallow coverage on the basis of poor housekeeping, including overcrowding or the storage of rubbish and flammable materials. Two states deny inclusion in the FAIR plan due to violations of building and safety codes. Three states make properties in tax arrears ineligible. Comment, *FAIR Plans: History, Holtzman & The Arson-for-Profit Hazard*, 7 FORDHAM URB. L. REV. 617, 623 n.33 (1979). HO-2 form homeowner's insurance also includes: vandalism and malicious mischief; theft; breakage of glass; falling objects; damage caused by weight of ice, snow or sleet; collapse of building; freezing, cracking or leakage of plumbing; and personal liability insurance. R. MEHR & E. CAMMACK, *supra* note 4, at 177.

35. 12 U.S.C. § 1749bbb-2(a)(2).

36. *Id.* In 1970, HUD exercised its authority to require state programs to make vandalism and malicious mischief coverage available. 44 C.F.R. § 55.3(a) (1979). In addition, 12 U.S.C. § 1749bbb-9(a)(1) (1976) mandated that before riot reinsurance becomes available to insurers, the state must enact legislation authorizing reimbursements to HUD for riot losses in amounts up to 5% of the aggregate direct premiums in reinsured property lines in the state for the previous calendar year. One study indicated that this state layer of liability ranged from $2 million in Delaware to $99 million in California in 1978. *Flood Insurance & Crime & Riot Reinsurance: Hearings Before the Subcomm. on Insurance of the Senate Banking, Housing & Urban Affairs Comm.*, 96th Cong., 2d Sess. 337 (1980) [hereinafter cited as *1980 Senate Banking Hearings*]. *See generally id.* at 341-52, 370-401, 425-36.

37. 12 U.S.C. § 1749bbb-9(a)(2) (1976).

38. In 1978, FAIR plans had $27 billion in coverage outstanding. NAIC 90 Day Report, *supra* note 16, at 39.

39. The states were California, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode

Rico and the District of Columbia. Nevertheless, residual market plans were inadequate substitutes for voluntary market insurance. Urban residents fought for broad coverage and prices comparable to those in the voluntary market. They were opposed by rural and suburban interests, wh viewed the spreading of urban risks as increasing their insurance costs, and insurance companies, who viewed the plans as an attack on their underwriting discretion. The latter interests won out, creating great disparities between the voluntary and residual markets. The most apparent difference was in price: in eleven states, FAIR rates exceeded voluntary market rates.[40] The state with the largest FAIR plan, New York,[41] had legislation requiring the plan to be self-sustaining,[42] and FAIR plan rates soared to over three times those of the regular market.[43] Effective rate differences in all states were also escalated by premium surcharges[44] which resulted from a significantly higher incidence of pre-policy inspections in the residual market (these inspections forced FAIR risks to pay for insuring conditions that went undetected in the voluntary market). Insurable, but objectively or subjectively substandard risks often were "written-out" by the voluntary market and then "rated-out" by FAIR plans.

Services in the residual market also compared unfavorably to those in the voluntary market. Typical problems ranged from the time required to obtain coverage to procedural burdens in becoming insured.[45] In some instances, FAIR insureds' policies were can-

---

Island, Virginia, Washington and Wisconsin. *See generally* INSURANCE CRISIS, *supra* note 8, at 47-49.

40. *See 1980 Senate Banking Hearings*, *supra* note 36, at 183 (memorandum from Gloria Jimenez, Federal Insurance Administrator to the NAIC Executive Committee).

41. In 1977, California surpassed New York as the state with the largest FAIR plan. Since that time rapid growth in the California (132,384 policies written in 1979) and Pennsylvania (115,163 policies written in 1979) FAIR plans and shrinkage in the New York residual market (98,475 policies written in 1979) have made New York's the third largest plan. Federal Ins. Administration, FAIR Plan (Feb. 15, 1980) [hereinafter cited as FIA 1980 Data Sheet].

42. 1968 N.Y. Laws, ch. 131 § 653(3) (amended 1979). This requirement of "self-rating" was unique to New York, although discrepancies existed in other states. *See* notes 173-76 and accompanying text *infra*. The New York disparities provided the impetus for the passage of the Holtzman Amendment in 1978. *See generally* notes 173-74 and accompanying text *infra*.

43. AETNA REPORT, *supra* note 12, at 141.

44. Surcharges are assessed by insurers for inadequacies in an insurable structure that make the risk substandard, *e.g.*, minor building code violations and older wiring systems.

45. On January 26, 1972, the Federal Insurance Administrator wrote to the Chairman of the National Committee on Property Insurance, delineating widespread deficiencies in FAIR Plans. Many of these problems persist today:

78-076 O - 88 - 29

celed simply because they filed a claim after having suffered a loss.[46] But the greatest problem for the largest number of FAIR insureds was that they were paying more and getting substantially less for their money. Only five states—Illinois, Massachusetts, Rhode Island, Wisconsin and Michigan—offered homeowners' coverage in their FAIR plans. In the remaining states, residual insureds were denied the prepackaged economies of standard homeowners' coverage,[47] and were often unable to purchase a collection of separate policies that would duplicate its comprehensive coverage. Further, FAIR plans often required claims to be settled on the basis of fair market[48] or actual cash value,[49] instead of replacement

---

1) *Inequitable treatment of FAIR insureds.*

a) The imposition of charges on class-rated risks contrary to normal practices and the failure to notify insureds as to how charges might be eliminated;

b) The lack of package policies (*e.g.*, homeowners'). In most FAIR states, residual insureds must buy several single peril policies, at great cost (if they are obtainable), to duplicate the coverage provided by package policies in the voluntary market;

c) The imposition of procedural burdens not found in the regular market, such as the requirement of payment by certified check;

d) Failures to establish direct service in inner-city areas or to get FAIR insureds back into the voluntary market.

2) *Upward rate revisions for FAIR risks predicated almost entirely on judgment factors, rather than on concrete and credible statistical data.* The Holtzman Amendment prohibits charging FAIR risks more than the rates or advisory rates set by the principal state-licensed rating organization for essential property insurance in the voluntary market. However, some FAIR states' rate schedules contravene these requirements. *See* note 176 and accompanying text *infra*.

3) *Inferior management and statistical operations.*

a) Insufficient data to justify rate levels or surcharges;

b) Excessive ratio of incurred-to-paid losses;

c) Excessive underwriting and loss adjustment expenses.

4) *Unjustified delays in providing coverage, failure to give appropriate notice of cancellation and application of unfair and discriminatory procedures.* These practices include excessive charges for binder coverage (temporary policy issued after receipt of application from prospective insured).

FULL INSURANCE AVAILABILITY, *supra* note 23, at 26-32. *See also* Note, *The Central City Insurance Crisis: Experience Under the Urban Property Protection and Riot Insurance Act of 1968*, 38 U. CHI. L. REV. 665, 673-79 (1971).

46. In Missouri, the FIA found that FAIR insurers were refusing to grant coverage to their residual risks who had filed claims for losses. The State Department of Insurance denied the FIA's original request to overrule the activity. After the FIA conducted public hearings on the matter, the Department reversed its earlier position and ordered FAIR insurers to pay all legitimate claims. Since 1975, Missouri's FAIR insurers have paid out over $500,000 in previously-denied claims. INSURANCE CRISIS, *supra* note 8, at 23.

47. *Compare* HO-2 form homeowners' insurance (discussed in note 35 *supra*) *with* the minimum "essential insurance" (described in notes 35-36 and accompanying text *supra*).

48. Fair market value is defined as the market price at time of either sale or purchase. In transitional neighborhoods, this is typically lower than replacement cost.

49. Actual cash value is determined by deducting estimated depreciation from the cost

cost,[50] which may be needed to repair or rebuild their properties.[51]

UPPRA's drafters would perhaps be most surprised by the acceleration of voluntary market disinvestment in quieter times. FAIR plans were viewed as markets of last resort for a small number of properties deemed likely to suffer damage from civil disorders or other extraordinary circumstances. Yet in 1979, over 1,035,000 policies were written by FAIR plans, a sixty percent increase over 1975 totals.[52] Furthermore, community groups charged that uncontrolled underwriting discretion had resulted in FAIR plans replete with good risks: only 4.8 percent of FAIR insureds had suffered *any* losses.[53]

Community groups viewed the combination of inadequate service and higher prices as devastating. A 1977 study by Robert Abrams[54] revealed that forty-five percent of Bronx residents and businesses seeking basic property insurance in 1977 were forced to resort either to the excess line market[55] or the FAIR plan. Even

---

of replacing or restoring the property to its condition immediately prior to the loss.

50. Replacement cost is defined as the cost to restore the same building with *identical* materials and workmanship. As this may be exorbitant for older structures, some companies offer repair cost policies (*i.e.*, the cost to restore a functional building with contemporary materials and workmanship).

51. Two assumptions are implicit in this limitation of coverage. The first is that the "moral hazard" of arson-for-profit (*see* notes 67, 84-87 and accompanying text *infra*) is greater among FAIR insureds. To the extent that this assumption is valid, penalizing all FAIR insureds is not an appropriate solution for the arson-for-profit problem. A better approach to reduce this "moral hazard" would be to pay repair or replacement cost only when the insured rebuilds at the same location within a reasonable time. When rebuilding does not occur, settlement could be capped at fair market or actual cash value. The second assumption is that inferior service in the residual market will keep it as small as possible. The Aetna Task Force argues that having a small residual market is important for several reasons: it minimizes inequities to consumers; it minimizes criticisms of the industry; it aids in achieving FAIR reform; and it prevents increased governmental intervention in the business of insurance. AETNA REPORT, *supra* note 12, at 141-44, 151-52. None of these arguments address the problem of the "good risk" who, desirous of but unable to obtain voluntary market coverage, is left with diminished services in the residual market at a higher price.

52. FIA 1980 Data Sheet, *supra* note 41, at 1.

53. *Rights & Remedies of Insurance Policyholders. Hearings Before the Subcomm. on Citizens & Shareholders Rights & Remedies of the Senate Judiciary Comm.*, 95th Cong., 2d Sess., pt. 1, at 3 (1978) [hereinafter cited as *Rights & Remedies*]. Furthermore, in 1977 approximately one-third of the policies written by New York FAIR had surcharges imposed due to hazardous conditions. "The implication is that about two thirds of the properties in the FAIR plan are sufficiently well maintained so as not to justify the imposition of surcharges." B. MELEWSKI & M. LAMPI, *supra* note 8, at 29.

54. R. Abrams, The Insurance Industry: It Redlines Too (1978), *reprinted in Rights & Remedies*, *supra* note 53, at 634.

55. The excess line market is supplied by insurers who are not licensed in the state, and therefore, are not regulated by the state department of insurance.

more alarming was Abrams' finding that one-third of those rejected by the voluntary market chose to forego coverage entirely, rather than pay FAIR rates; more than half of all Bronx homeowners did not insure their properties to full value because of prohibitively high premiums.[56] The implications of this are twofold: essential reinvestment was discouraged as property owners questioned the future of their neighborhood; and in the event of catastrophic loss, the absence of insurance proceeds makes these families unlikely to rebuild. These phenomena can seal the fate of marginal neighborhoods. Activists also charged that the effect of the voluntary market's writing-off neighborhoods was to stigmatize them and pave the way toward further deterioration.

As a result of FAIR plan inadequacies and perceived abuses by the voluntary market,[57] pressures grew for reform of FAIR plans. The next sections of this article discuss the nature of the voluntary market, insurance regulation and the responses to these pressures.

B. ANATOMY OF THE VOLUNTARY MARKET

The inadequacies of FAIR plans noted above are important because of widespread deficiencies in the voluntary market. Many of the undesirable industry practices complained of today were described by the Hughes Panel in 1968.[58] Insurable risks are often relegated to the residual market, not from fear of riot losses, but because they are perceived as being less profitable than suburban risks. This practice is called "dumping." The insurance industry contends, however, that the free market will not allow an intentional or systematic disregard of good risks and insists that it employs sound business practice.[59] Any problems, says the industry, are due to the regulatory structure: when insurers are unable to charge adequate rates, supply failures are inevitable.[60]

---

56. R. Abrams, *supra* note 54, at 2, *reprinted in Rights & Remedies*, *supra* note 53, at 635.

57. *See* notes 58-76 and accompanying text *infra*.

58. *Compare* this section *with* HUGHES PANEL, *supra* note 4, at 5, 6, 26, 28, 32, 89.

59. *See, e.g.*, STATE FARM INS. CO., A REPORT TO THE PEOPLE: A RESPONSE TO THE INSURANCE BUREAU'S PROPOSAL TO DISRUPT THE REGULAR INSURANCE MARKET IN MICHIGAN (rev. 1978).

60. According to a State Farm publication, "[i]t is axiomatic that whenever the actuary is prevented from adjusting prices to fit the book of business, the underwriter is forced to adjust the book of business to fit the price permitted." *Id.* at 26. It is argued that the rate regulatory process inevitably leads to a gap between supply and demand which forces the

To some extent, it is true that availability problems are accelerated by regulatory interference. However, closer scrutiny reveals a number of industry "short-cuts"—*i.e.*, decisionmaking based on generalizations rather than examinations of individual risks.

Industry practices must be viewed on both the company and agent levels. Agents perform the "front-line underwriting"[61] of the business submitted to the company. They exercise a great deal of discretion in determining what business the company will *not* underwrite. Thus, even if a company decided to embark on an anti-redlining policy, implementation might be difficult.[62] Part of this problem is related to communications problems between the company and its agents. Another part is inherent in the structure of company-agent relations. An agent who sells to a disproportionate number of persons suffering losses may find his or her agency contract terminated.[63] In addition, some agents hold profit-sharing agreements with companies and are paid bonuses for consistently good loss-experience records.[64] The result is to reward conservatism and discourage the writing of policies for perceived higher risks.[65]

During the past decade, a number of redlining practices committed by both agents and companies have been documented by governmental investigations. Many agents and companies will not insure buildings that are over forty years old.[66] Others will not provide coverage for low-value houses, or will limit the amount of cov-

---

companies to screen out higher risks. Unless insurers can earn adequate profits, consumers will suffer. "[P]rofit is the necessary cornerstone upon which social responsibility can be built." NAIC 90 Day Report, *supra* note 16, at 5. States have prevented companies from experimenting with new forms of policies which, although providing reduced coverage, would enable companies to consider higher risks and reduce rates at a time of inflationary replacement costs. *See generally id.* at 12-20; Advisory Comm. to the Nat'l Ass'n of Ins. Commissioners Task Force on Ins. Redlining, Twelve Challenges (n.d.) at 7.5-7.6.

61. AETNA REPORT, *supra* note 12, at 38.

62. Indeed, one state insurance commissioner responded to the *1980 JLSP Survey*, *supra* note 8, with the statement that he thinks "a majority of . . . redlining practices are being conducted by agents as opposed to companies."

63. R. MEHR & E. CAMMACK, *supra* note 4, at 579.

64. *Id.*

65. *See also* B. MELEWSKI & M. LAMPI, *supra* note 8, at 5. Underwriters are also judged by the profitability of the business they accept and their performance is rewarded accordingly. Indeed, the Hughes Panel observed that "[i]nsurance people often say that the best underwriters are basically pessimists." HUGHES PANEL, *supra* note 4, at 29.

66. *See* MIDWEST CIVIL RIGHTS ADVISORY, *supra* note 3, at 7; A. Valukas, An Investigation of the Discrimination in the Sale of Homeowners Insurance in Illinois 7 (n.d.), *reprinted in Rights & Remedies*, *supra* note 53, at 358.

erage to the building's market value, rather than the higher replacement cost, in order to avoid the "moral hazard" of inviting arson-for-profit.[67] To reduce risk exposure in "deteriorating areas," some companies have orally instructed agents to apply more rigorous underwriting standards[68] or not to write certain types of policies in enumerated ZIP codes.[69] Companies have withdrawn from certain neighborhoods by terminating agents and cancelling their books of business, penalizing "good risks" in the process.[70] The size of rating territories has been shrinking, further escalating insurance prices and housing costs for central city residents.[71] Some company manuals instruct underwriters either to refuse or to limit the availability of coverage for applicants with personal characteristics that are perceived to increase risk. These applicants include unmarried males, blue-collar or service workers, or residents of "changing neighborhoods."[72] Some loss-free policyholders receive

---

67. A. Valukas, *supra* note 66, at 7, *reprinted in Rights & Remedies*, *supra* note 53, at 358. *Rights & Remedies*, *supra* note 53, at 85-86, 141. A moral hazard is said to exist when the attributes of the risk create an incentive to cause a loss or initiate a claim. AETNA REPORT, *supra* note 12, at 39. According to R. SCHACHTER, *supra* note 11, at 15-16, Allstate terminated over 5,800 Chicago homeowners' policies for this reason alone in 1977-78.

68. A. Valukas, *supra* note 66, at 23, *reprinted in Rights & Remedies*, *supra* note 53, at 374. The FIA noted that although charges of redlining are less dramatic in California than in older Snowbelt cities, testimony at hearings held in Los Angeles indicated more stringent underwriting standards in predominantly minority parts of the city. FIA: Detroit, LA, Miami, *supra* note 8, at 9-10. *See also* B. MELEWSKI & M. LAMPI, *supra* note 8, at 22.

69. MIDWEST CIVIL RIGHTS ADVISORY, *supra* note 3, at 7. A. Valukas, *supra* note 66, at 17, *reprinted in Rights & Remedies*, *supra* note 53, at 368-69. A list of proscribed ZIP codes was found to be used by one of Chicago's largest insurance brokers, W.W. Vincent Company, and its parent company, the Insurance Company of Illinois. Chicago Tribune, June 3, 1979, § 1 at 3. *See also* R. SCHACHTER, *supra* note 11, at 5, 11.

70. A. Valukas, *supra* note 66, at 6, *reprinted in Rights & Remedies*, *supra* note 53, at 357; FIA: Detroit, LA, Miami, *supra* note 8, at 5.

71. The atomization of rating classification schemes reached its logical absurdity with respect to automobile insurance in a plan devised by one Illinois insurer. The plan would have resulted in two million more rating slots than the total state population, including nondrivers. FULL INSURANCE AVAILABILITY, *supra* note 23, at 4.

72. MIDWEST CIVIL RIGHTS ADVISORY, *supra* note 3, at 8. *Rights & Remedies*, *supra* note 53, at 82-85, 141. *Senate Comm. on the Judiciary, Subcomm. on Citizen & Shareholder Rights & Remedies, Citizens & Shareholders Rights & Remedies Annual Report, S. Rep. No.* 737, 95th Cong., 2d Sess. 6 (1978) [hereinafter cited as *Citizens & Shareholders 1978 Report*]. The arbitrariness of property insurance underwriting standards is illustrated in the following exchange between Senator Metzenbaum and William Gibson, Vice President and Associate General Counsel of the Continental Insurance Company, *quoted in Rights & Remedies*, *supra* note 53, at 83. The Senator read a telling excerpt from The Continental Insurance Companies Personal Lines Underwriters' Manual: " 'The following occupations should, in our opinion, be included among those that will, as a group produce higher than average frequency of loss ratio: advertising agencies [sic], painters, antique deal-

non-renewal notices without warning[73] and then learn that many insurers deny coverage to any applicant whose policy was canceled or not renewed by another company.[74]

Although many of these practices appear on their face to be geographically neutral, they portend ill for the urban core. "Deteriorating areas" and concentrations of older housing tend to be located in older central cities.[75] Disparities between market value and replacement cost typically are phenomena of transitional urban areas. Hence, redlining has serious implications for the national urban policy.

Furthermore, these practices may be justified to the extent that they are supported by sound actuarial data—this is the distinction between *fair* and *unfair discrimination*.[76] Nevertheless, even statistically fair discrimination must be subordinated to definitions of societal fairness and the equitable distribution of losses. For example, even if it could be shown statistically that blacks have a higher mortality rate than whites or suffer greater vandalism losses, it would be counter to public policy to consider racial criteria.[77]

---

ers, professional athletes, radio and television stations [sic], waiters and waitresses, fashion designers.'" *Id.* "Why," he asked, "would a painter or a waitress or an antique dealer or a fashion designer pose any unusual risk as a homeowner? Do they break more things or what? Do they have more things stolen or do they bring their homes down?" *Id.* Gibson answered, reading from the manual's preamble, "'While we admittedly cannot readily document our opinions on this and many other points, we are nevertheless, convinced without the slightest reservation that when considered as a group rather than individuals, persons engaged in some occupations have a greater frequency of loss under homeowners policies than persons engaged in some other occupations.'" *Id.* "This," Gibson explained, "is again, the collective opinion of people who are attempting to find a way to make a profit in a highly competitive business." *Id.*

73. FIA: Detroit, LA: Miami, *supra* note 8, at 4-5.

74. *See id.* at 10; MIDWEST CIVIL RIGHTS ADVISORY, *supra* note 3, at 5.

75. For example, the percentage of housing built before 1939 is 85.5 in Buffalo; 62.3 in New York City; 81.2 in Trenton; 61.8 in Detroit; and 66.5 in Chicago. U.S. DEP'T OF COMMERCE, 1970 CENSUS OF HOUSING, VOL. I (HOUSING CHARACTERISTICS FOR STATES, CITIES AND COUNTIES) Table 43 (1972).

76. Fair discrimination is central to the function and operation of insurance rating and underwriting. As the Hughes Panel observed more than ten years ago, "a risk must bear an appropriate rate, if a property is significantly more hazardous than average, it must yield a commensurately higher premium . . . . Unfair discrimination occurs in insurance rating when individual property risks are assigned to rating classes which do not properly reflect their particular loss potential.

Fair Housing Act: Hearings on H.R. 3504, and H.R. 7787 Before the Subcomm. on Civil & Const. Rights of the House Judiciary Comm., 95th Cong., 2d Sess. 593 (1978) (footnotes omitted) (statement on behalf of NAIC) [hereinafter cited as *Fair Housing Hearings: 1978*].

77. An analogy may be drawn to the Supreme Court's holding in Los Angeles Dep't of

The principle of social fairness is most directly tested by territorial rating schemes. In the past, cities and their suburbs were generally aggregated as one territory. Today most cities are distinct territories and major cities are subdivided into separate territories.[78] Where the loss experience of objectively substandard urban risks is aggregated only with central city risks, the result is to reduce rates in the suburbs and to increase them in the cities. Nevertheless, companies argue that this division is necessary to relieve rate inadequacy in the inner-city and will make insurance more readily available.[79]

Community groups contend that the industry's rating territory refinements have overly differentiated the market, perhaps approaching the limiting case of self-insurance.[80] Greater refinements of classifications render insurance generalizations less useful and conflict with the concept of insurance as a social good that spreads risks throughout society. Community groups argue that under the present classification system, a central city risk which is, in every respect except location, identical to a suburban risk pays a higher premium because it supports other urban risks which are *unlike* it in every way except location. The results are even more unfair when older suburbs with fire loss experience equivalent to or worse than the central city are aggregated with lower-rate suburbs.

Redlining in the form of territorial classifications is contrary to the stated national policy goal of urban revitalization.[81] It may

---

Water & Power v. Manhart, 435 U.S. 702, 709 (1978), that Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2(a)(1) (1976)), forbids gender considerations in determining employee contributions to pension plans, *even if supported by actuarial data*.

> For when insurance risks are grouped, the better risks always subsidize the poorer risks. Healthy persons subsidize medical benefits for the less healthy . . . persons who eat, drink, or smoke to excess may subsidize pension benefits for persons whose habits are more temperate. Treating different classes of risks as though they were the same for purposes of group insurance is a common practice which has never been considered inherently unfair.

435 U.S. at 710.

78. AETNA REPORT, *supra* note 12, at 126-27.

79. *Id.* at 127. *See also* note 60 and accompanying text *supra*.

80. Ultimately, refinement of classifications could result in self-insurance. Insurance would no longer spread risks, as everyone would pay the cost of his or her own loss. As classification refinement approaches this limit, some individuals would be at a greater disadvantage than if they insured themselves. All insureds pay for administrative costs in addition to their share of predicted losses while self-insured individuals pay only for their losses. MIDWEST CIVIL RIGHTS ADVISORY, *supra* note 3, at 17. *See also* note 71 *supra*.

81. *E.g.*, The Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633, reaffirmed the goals of the Housing and Urban Development Act of 1968 (*see* note 31 *supra*) and noted that "the deterioration and abandonment of housing for the Na-

be socially desirable to spread the costs associated with environmental hazards and risks associated with older cities among the entire population. Indeed, cross-subsidization may be necessary to reverse urban decay. In recognition of the impact of territorial classifications on increasing inner-city housing costs, the FIA concluded that:

> [e]ven if every insurance applicant could purchase coverage of his/her choice in the voluntary market, it is apparent that the method used to determine insurance rates by territory has the effect of undermining the efforts of the Federal, State and local governments to make cities more attractive areas in which to live and to do business.[83]

Other redlining allegations bring up questions of statistical as well as social fairness. An actuarial study by one major insurer found that age of structure is an accurate loss predictor only between two classifications: buildings less than five years old and buildings more than five years old.[83] Furthermore, older buildings occasionally undergo rehabilitation, including the installation of new wiring and heating systems. Thus, there is no justification for differentially rating similar risks *within* each classification if they are distinguishable by age alone. Yet differential rating on this statistically dubious basis is a common practice.

The FIA,[84] neighborhood organizations,[85] and an Aetna Life and Casualty Task Force[86] have all challenged the magnitude of the "moral hazard problem" (based on the market value/replacement cost disparity), at least with respect to owner-occupied dwellings. Such an arsonist risks his or her personal possessions, crimi-

---

tion's lower income families has accelerated over the last decade and that this acceleration has contributed to neighborhood disintegration and partially negated the progress toward achieving the national housing goal which has been made primarily through new housing construction." 42 U.S.C. § 1441a(b) (1976). It declared a national goal of neighborhood conservation concentrating on "housing and neighborhoods whose deterioration is evident but has not yet become acute." 42 U.S.C. § 1441a(c) (1976).

82. FIA: Detroit, LA, Miami, *supra* note 8, at 4.

83. A. Valukas, *supra* note 66, at 7, *reprinted in Rights & Remedies*, *supra* note 53, at 358.

84. Its Detroit investigation found that "[t]here was no evidence that any policy-by-policy analysis was made to determine whether the low market value of a property, in relationship to replacement value, had increased the probability that the owner might resort to arson." FIA: Detroit, LA, Miami, *supra* note 8, at 5.

85. G. Keenan, Insurance Redlining: Profits v. Policyholders 86-88 (Nat'l Training & Information Center, 2d ed. 1979).

86. Aetna Report, *supra* note 12, at 86.

nal prosecution, and the lives of his or her neighbors. To the degree that a problem exists the solution may be to require that the insured rebuild at the present site in order to obtain full replacement cost coverage.[87]

Similarly, the practice of ZIP code underwriting, even if statistically justified, is subject to questions of social policy fairness. ZIP codes are heterogenous areas, and even if a zone can be characterized as blighted, it might contain enclaves of well-maintained homes and stable neighborhoods. Hearings conducted in several cities revealed numerous instances in which newly renovated buildings in stable areas had been relegated to the residual market because they were presumed to share the undesirable traits of some other buildings within the same ZIP code.[88] Finally, no studies support the premise that marital and occupational status are correlated with fire loss. Hence, the FIA is correct that these forms of insurance redlining are "not based on any sound underwriting standard but rather on highly subjective criteria that would appear to result from unfounded generalizations or preconceptions about urban property risks."[89]

Finally, insurance companies have been charged with redlining in the placement of agents. The scarcity of agents in the urban core is well-documented.[90] The industry views this argument as

---

87. The Aetna Task Force suggests offering this type of policy where the homeowner seeks a replacement cost policy. The company presently provides a Replacement Cost Adjustment Endorsement for risks with a market value of 50-70% of replacement cost. The Endorsement is a more costly product which has sold poorly. *Id.* at 84-86.

88. *See* Federal Ins. Administration, U.S. Dep't of Housing & Urban Development, In the Matter of Public Hearing on Insurance Redlining—FAIR Plan, vol. I (Brooklyn, N.Y., testimony of Jan. 11, 1978) at 34, 69-71; vol. II (Brooklyn, N.Y., testimony of Jan. 11, 1978) at 2, 25; vol. III (Bronx, N.Y., testimony of Jan. 12, 1978) at 139-40. In one 24-unit building in Brooklyn, annual insurance premiums jumped from $762 in the voluntary market to $2,700 under the FAIR plan, even though the owner spent $35,000 for "complete rehabilitation" (if totally absorbed into rent, this would have necessitated an increase of $7 per apartment per month—otherwise it would have diminished the profitability of the building). Then-Acting Administrator Hunter examined both the building and the neighborhood and concluded that "[i]t was a fine residential area, mostly one-family residential, clean streets, well-maintained homes . . . . [The building was so well-kept that] you could have eaten off the basement floor." *Id.* vol. IV (Bronx, N.Y., testimony of Jan. 12, 1978) at 140. Yet, the owners applied to eight insurance companies, each of which refused to send an inspector to examine the property.

89. Insurance Crisis, *supra* note 8, at 44.

90. *See* note 70 and accompanying text *supra*. Indeed, one of Michigan's largest insurers has more agents in the small communities of Dearborn and Dearborn Heights than in the nearby city of Detroit. FIA: Detroit, LA, Miami, *supra* note 8, at 7. The in-house Aetna study also found a heavy concentration of agencies in the suburbs, significantly less in cen-

specious and contends that suburban agents in conjunction with those located in the central business district satisfy inner-city insurance needs.[91] Flaws in this argument are readily apparent. The inaccessibility of agents may lead homeowners to believe that they have no option other than the FAIR plan. Further, agents unfamiliar with a neighborhood may view applicants as bad risks solely because of the area's reputation. Finally, the large percentage of inner-city policies written by suburban agents may merely be renewals and not new policy activity.

C. THE REGULATION OF THE INSURANCE INDUSTRY

> The business of insurance is under a unique regulatory system. It is the only major interstate financial industry that is regulated primarily by the States. In contrast, the securities industry is under Federal regulation and the banking industry is under both Federal and State regulation. Moreover, because of the McCarran-Ferguson Act, the Federal Government is precluded from exercising antitrust and trade practice jurisdiction that would normally apply to businesses in interstate commerce.[92]

1. History. The paucity of federal action on the insurance redlining problem may be attributed to a combination of historical and political factors. Until 1944, the courts held that insurance contracts constituted *intrastate* commerce and could not be regulated by the federal government.[93] That view was reversed in *United States v. South-Eastern Underwriters Association*,[94] in which the Supreme Court determined that property and liability insurance *were* elements of interstate commerce and thus subject to federal anti-trust laws. The *South-Eastern* decision, however, had little practical effect on the scope of federal insurance regulation. By the time of the ruling, the insurance industry had developed close ties to its state regulators,[95] and these groups united in

---

tral business districts, few in urban residential areas, and none in large parts of the inner city. AETNA REPORT, *supra* note 12, at 98-100.

91. The Aetna report indicates that over 50% of inner-city business written in Philadelphia, Cincinnatti, Los Angeles, Pittsburgh, Chicago and Cleveland were written by suburban agents and 8 to 32% by business district agents. *Id.* at 110-18.

92. GAO REPORT, *supra* note 1, at 165.

93. Paul v. Virginia, 75 U.S. (8 Wall.) 168, 183 (1869), viewed insurance policies as individual contracts with effect and execution solely on a local level.

94. 322 U.S. 533, 541-42, 553 (1944).

95. One observer termed this a "classic case of incest." *Hearings on the Operation of Urban Property Protection & Reinsurance Program Before the Subcomm. on Housing of*

opposing the expansion of federal regulation.

The degree of political clout held jointly by the insurance industry and state insurance commissioners was demonstrated by the passage of the McCarran-Ferguson Act in 1945. The Act exempted the insurance industry from federal regulation to the extent that it was covered by state law.[96]

Several policy arguments are usually cited to support the continued dominance of state regulation of the industry.[97] First, the states have traditionally been responsible for the regulation of the insurance business—an area where federalism has been valued. Second, the states already have a regulatory apparatus in place and the creation of an additional federal bureaucracy would be wasteful. Third, state regulation promotes pluralism, which allows experimentation. Finally, state regulation is more responsive to the public and to local needs.

These arguments are forceful, but serious questions can be raised as to whether they necessitate the state monopoly on insurance regulation. First, although the concept of federalism is important in American society, federal involvement in areas such as the protection of civil rights has been widely accepted.[98] It may be argued that insurance availability is a civil right.[99] Second, federal involvement need not result in a costly bureaucracy. It is possible to avoid a duplicate structure by having state officials implement both federal and state standards.[100] Third, federal involvement would not necessarily stifle state innovation; federal programs could be designed to encourage such innovation. Further, diversity can be costly. Companies face fifty sets of state insurance codes, most of which are similar but not identical. Federal regulation

---

the House Comm. on Banking & Currency, 91st Cong., 1st Sess. 349 (1969) (statement of Rep. William Moorhead).

96. 15 U.S.C. §§ 1011-1015 (1976). The Act, did, however, make the Sherman Act (15 U.S.C. §§ 1-7 (1976)) applicable to cases of boycott, coercion and intimidation. 15 U.S.C. § 1013(b) (1976). For a discussion of the history and scope of the McCarran-Ferguson Act, see McHugh, *The McCarran Act Shield: Its Origin, Ecolution and Future*, 13 Forum 630, 630-39 (1978). For the role of the state insurance commissioners, see Johnson, *Insurance Regulation at the Crossroads*, 1977 Ins. L.J. 7, 32 (1977). The most significant state responses to McCarran-Ferguson came in the form of rate regulation legislation (*see* note 162 *infra*).

97. GAO Report, *supra* note 1, at 165-72. *See also* Days, *Changing Attitudes About Insurance Regulation*, 14 Forum 744 (1979).

98. *See, e.g.*, The Fair Housing Act of 1968, as described in notes 189-256 and accompanying text *infra*.

99. *See* notes 189-256 and accompanying text *infra*.

100. *See, e.g.*, the proposed Insurance Competition Improvement Act, discussed in notes 352-85 and accompanying text *infra*.

could thus displace some state regulation and effectuate significant economies of scale by, for example, eliminating duplicative filing of forms and scrutiny concerning company solvency and other matters.

But the most dubious argument in favor of state regulation is its responsiveness to local needs. A 1979 study of the effectiveness of state insurance regulation by the United States General Accounting Office (GAO) concluded that:

> many insurance problems were not congruent with State boundaries, and State insurance departments have no unique advantages in dealing with such problems. For example, the availability problems of property insurance are characteristic of many older urban areas, while farm areas have other insurance needs. Cities like Chicago and New York probably have more insurance problems in common than they do with the rural areas within their own States. While State insurance departments may be uniquely knowledgeable about the problems of large cities within their jurisdiction, these problems are not unique to any State, but rather are rooted in demographic and economic situations common to many cities across State boundaries. Moreover, with regard to the problem of redlining, most State insurance departments do not have adequate procedures for learning about the extent of alleged unfair discrimination.[101]

Further, it may be argued that state insurance departments are most responsive to the industry.[102] The GAO has noted a less than arms-length relationship between the National Association of Insurance Commissioners (NAIC) and the industry.[103] Some charge that state insurance commissionerships are "revolving doors" between jobs in the industry.[104] In contrast to the close working relationship between the industry and its regulators, consumers are often unfamiliar with complaint and rate-making processes.[105] A unitary approach to rates and complaints may facilitate consumer involvement.

---

101. GAO REPORT, *supra* note 1, at 170-71.

102. *See generally* G. KEENAN, *supra* note 85, at 60-61, 66-68.

103. *Id.* at 180-81, 183.

104. GAO REPORT, *supra* note 1, at 176-77. Of the 46 states for which the GAO had information, one half of the commissioners had prior employment experience in the industry, either with an insurance company, an insurance agency, or as an insurance attorney. In contrast, in only 17 states, did the commissioner have previous experience in the insurance department.

105. *Id.* at 67.

2. *FAIR.* The Hughes Panel wrote its report in a milieu characterized by "an industry and established regulatory regime adamantly hostile to lodging any regulatory authority over the insurance industry in any federal agency."[106] The resulting legislation restricted the federal role to the establishment of a reinsurance structure and to the auditing of FAIR performance.[107] Those states accepting the federal carrot were required to provide a state layer of coinsurance,[108] to establish and administer the FAIR plan and to otherwise regulate the insurance industry. The resulting FAIR plans differed widely in the scope of coverage,[109] the mandated participation by insurance companies,[110] and the established methods of distributing losses.[111] Until the Holtzman Amendment[112] was implemented in 1979, states also differed widely as to how FAIR plan rates were set.

UPPRA's decentralization left the federal government with little power in overseeing FAIR activities. Its single regulatory weapon, the outright termination of a state's riot reinsurance, was too blunt and, as memories of the 1960s riots faded, was too weak to be effective. Moreover, the FIA was not the only supplier of riot reinsurance; such coverage was available in the private market, albeit at higher cost. Furthermore, although HUD clearly had the

---

106. Works, *supra* note 25, at 496. Works provides an interesting discussion of the politics behind the Hughes Panel's recommendations and UPPRA at 448-49, 496-501.

107. Federal power was also diminished somewhat by the establishment of an Advisory Board, dominated by state and industry representation (12 U.S.C. § 1749bbb-1 (1976)), with whom the Secretary of HUD was required to consult before taking certain actions (12 U.S.C. §§ 1749bbb-6, 1749bbb-8, 1749bbb-9 (1976)).

108. See discussion of 12 U.S.C. § 1749bbb-9(a)(1) (1976) in note 36 *supra*.

109. *E.g.*, only five plans offer homeowners' coverage.

110. Most states require all licensed companies selling fire and related lines of insurance to participate in the FAIR plan and share in its profits and losses. Indiana, Iowa and Kansas allow insurance companies the option of not participating. *1980 Senate Banking Hearings*, *supra* note 36, at 483; *1980 JLSP Survey*, *supra* note 8.

111. Most states assess all companies a proportionate share of the plan's losses based on the percentage of market premiums that each wrote in the previous year. The losses are eventually passed back to all policyholders, through the calculation of costs in determining rates. *1980 Senate Banking Hearings*, *supra* note 36, at 293. This procedure may serve as an additional disincentive to write higher-risk policies (*i.e.*, depopulate the FAIR pool), because it increases a company's assessment based on its increased market share. A few states have overcome this problem. In calculating assessments, New York allows a double credit against premium volume for those FAIR policies picked up by voluntary market insurers. N.Y. INS. LAW § 654(1-a) (Consol. 1980). New Jersey is one of the few states that places a direct surcharge on all insurance bills sent to all FAIR and voluntary policyholders. *See* N.J. STAT. ANN. § 17:37A-22 (West Supp. 1980-81).

112. *See* notes 173-88 and accompanying text *infra*.

statutory authority to obtain whatever records it deemed necessary from FAIR plans,[113] to conduct audits,[114] and to impose conditions on reinsurance contracts,[115] HUD's requests for information were often ignored.[116] Although the agency's position has improved somewhat over time,[117] problems of accountability and coordination are inherent in this type of regulatory structure.[118]

3. State Efforts to Control Redlining. During the past few years, the effectiveness of state anti-redlining efforts has been harshly criticized by community groups,[119] senators,[120] and the GAO.[121] Serious questions have been raised concerning the capacity and desire of state regulators to address this problem effectively and a more activist federal role has been suggested. In response to these charges, a number of states have adopted anti-redlining statutes and regulations in recent years. Five types of anti-redlining legislation may be identified: three forms involve direct anti-redlining legislation, two forms represent interpretations of traditional unfair discrimination legislation.

The first type of legislation is the comprehensive approach adopted only in Michigan. In 1978, the legislature enacted a six month moratorium on most homeowners' policy cancellations.[122] To stem the tide of agent terminations and concomitant cancellations of books of business, the legislature also required companies

---

113. 12 U.S.C. § 1749bbb-14 (1976).

114. 12 U.S.C. § 1749bbb-14(d) (1976).

115. 12 U.S.C. § 1749bbb-8(c) (1976).

116. *See* Works, *supra* note 25, at 513-18.

117. In 1969, HUD received authorization and funding for an Office of Compliance and Review to monitor FAIR activities. 12 U.S.C. § 1749bbb-1 (1976).

118. Additional oversight problems are likely to develop in the wake of the forfeiture of UPPRA eligibility by nine states and Puerto Rico for failure to comply with the Holtzman Amendment. *See* notes 175-78 and accompanying text *infra*. It is unclear whether the FIA Administrator has the authority to examine these ten FAIR plans. *1980 Senate Banking Hearings*, *supra* note 36, at 23 (testimony of FIA Administrator Jimenez). If such authority does not exist, it would be a severe blow to the already limited degree of supervision.

119. *See, e.g.*, G. KEENAN, *supra* note 85, at 57-60.

120. *See, e.g.*, S. 2474, 96th Cong., 2d Sess., *reprinted in* 126 CONG. REC. S2977 (1980). Senator Howard Metzenbaum argues that "[h]istory has proved that regulation has been so ineffective that the rights of the individual have been lost in discriminatory practices that apparently are the rule rather than the exception in most of the insurance industry." N.Y. Times, Jan. 17, 1978, at 12, col. 1.

121. *See generally* GAO REPORT, *supra* note 1.

122. 1978 Mich. Pub. Acts No. 217 § 500.1209(4) (expired Dec. 5, 1978). *Id.* No. 219 § 500.2862 (expired Dec. 5, 1978). The exceptions to this moratorium were cancellations due to fraud, nonpayment of premium, failure to cooperate, transfers between affiliated insurance companies, and submissions of more than three claims in a three-year period.

to provide ninety days written notice and an explanation of the reasons for an agent's termination.[123] Furthermore, insurance companies were prohibited from cancelling or refusing to renew policies solely because of an agent's termination.[124] The 1979 Michigan Essential Insurance Act went further. It required companies to offer home insurance[125] to all risks meeting the objective criteria of their classification plans, mandated justifications for and placed limitations on the use of classification and territorial rating plans, and prohibited the penalizing of agents because of the risks of their books of business.[126]

The second form of legislation is typified by the recent NAIC Amendments to the Model Unfair Trade Practices Act, which define as prohibited unfair trade practices the:

> making or permitting of any *unfair* discrimination between individuals or risks of the same class and of essentially the same hazards by refusing to issue, refusing to renew, cancelling or limiting the amount of insurance coverage because of geographic location or age of the risk, unless it is for a *business purpose which is not a mere pretext for unfair discrimination.*[127]

The model legislation is not without problems. First, the inherent ambiguity, in "business purpose" might be used to legitimize present practices. Second, the statute does not address many of the difficulties such as territorial structure, agent placement and control of agent discretion.

Virginia law is essentially identical to the Model Act.[128] Wisconsin,[129] Kansas[130] and Wyoming[131] have achieved the same result

---

123. Mich. Comp. Laws Ann. § 500.1209(1) (Supp. 1980-81). *See also* Mich. Ins. Bureau Bull. 78-31 (Dec. 26, 1978).

124. *See* note 123 *supra*.

125. *See* notes 317-25 and accompanying text *infra*.

126. *Id.*

127. NAIC Model Act Relating to the Unfair Methods of Competition and Unfair and Deceptive Acts and Practices in the Business of Insurance, Amendments to § 4 of 1979, *reprinted in Fair Housing Act Amendments of 1979, Hearings on H.R. 2540 Before the Subcomm. on Civil & Const. Rights of the House Comm. on the Judiciary*, 96th Cong. 1st Sess. 767 (1979) (emphasis added) [hereinafter cited as *Fair Housing Hearings: 1979*].

128. Va. Code §§ 38.1-52.7 (4), (5) (Supp. 1980).

129. Wis. Ad. Code § Ins. 6.68 (1979). The regulation is pursuant to Wis. Stat. Ann. § 628.34(11) (West 1980), which is based on the premise that a statute cannot "foresee all the possibilities, present and future, of unfair trade practices" (Committee Comment 1975 *reprinted in* Annotation to *id.*) and provides a procedure for the commissioner to define such practices consistent with enumerated general principles.

130. Kan. Ad. Reg. 40-3-40 (Supp. 1979). In contrast to the Wisconsin regulations (*see* note 129 *supra*), the validity of the Kansas regulations is questionable because legislation to

through regulations. Wisconsin and Wyoming have attempted to deal with one problem inherent in the Model Act by placing the burden of proof for the "business purpose" exception on the party charged with a violation of the rule.[132] Florida law is fairly similar to the NAIC model. It prohibits refusals to insure or to continue to insure any risk solely because of the geographical location, age or lawful occupation of the individual or risk.[133] The Florida statute does not contain the business purpose language. Rather, the adverse decision must be based on a reasonable relationship between the particular characteristic and the coverage.[134] Denial of insurance because a consumer has previously been refused coverage by any insurer, is defined as an unfair trade practice, when it occurs with such frequency as to indicate a general business practice.[135]

Minnesota law may be viewed as a hybrid of the first two types of legislation. It does not contain the full insurance availability guarantee for all insurable risks of the Michigan Essential Insurance Plan. Yet it goes beyond the second form of legislation in several significant respects. First, it forbids differentials in rates based on the prohibited factors.[136] Second, it limits the reasons for policy cancellation to non-payment of premium, misrepresentation, acts or omissions of insureds that materially increase the probability of loss and physical changes in the property.[137] Third, unless the applicant was denied insurance by another company for any of these reasons, an insurer cannot deny coverage because of another carrier's adverse decision or because the property was insured under the Minnesota FAIR plan.[138] Fourth, the statute does not contain the "business purpose" language. Fifth, it limits geographical considerations to the following statewide criteria: proximity to an extraordinary hazard, quality of fire protection, and concentration of the insurer's risks.[139] Sixth, it contains aggregate and individual disclosure requirements.[140] Finally, the statute lim-

---

this effect was recommended by the state insurance department in 1978 and 1979, considered and not enacted by the legislature. *See 1980 JLSP Survey*, *supra* note 8.

131. Wyo. Ins. Reg., Unfair Trade Practices Reg. ch. XXIII § 3 (eff. Mar. 19, 1980).

132. *Id.* § 4.7; Wis. Ad. Code § Ins. 6.68 (1979).

133. Fla. Stat. § 626.9541(24) (Supp. 1979).

134. *Id.*

135. *Id.*

136. Minn. Stat. Ann. § 72A.20(13) (West Supp. 1979).

137. *Id.* §§ 65A.01(3a)(1), 65A.29(1).

138. *Id.* § 72A.20(13)(c), (d).

139. *Id.* § 72A.20(13)(d).

140. *Id.* §§ 65A.28, 65A.29. These provisions are discussed at note 279 and accompany-

its the factors related to a structure's age that may be considered in determining rating standards: age of the structure's plumbing, electrical, heating or cooling system, where age affects the risk of loss.[141]

The third form of legislation prohibits adverse underwriting decisions made *solely* on the basis of geographical location and does not address any other redlining practice. This approach is typified by the Missouri[142] and New Hampshire[143] statutes, which forbid the applicant's residence, as well as race, sex, national origin and lawful occupation as reasons for the cancellation, refusal to renew or denial of an application. Maryland[144] takes a slightly different approach, prohibiting declinations and non-renewals solely due to geographical location, unless the company files with the Commissioner a written statement designating the restricted area. New York[145] and Illinois[146] legislation also prohibit adverse decisions made solely on these grounds.

There are problems with this type of statute. Redlining often takes subtle forms (*e.g.*, age of building) rendering application of the statute questionable.[147] Further, it is frequently difficult to determine whether geographic location is the *sole* reason for the denial of coverage.

The New York legislation is more comprehensive than the

---

ing text *infra*.

141. *Id.* § 72A.20(13)(d).

142. Mo. Ann. Stat. § 375.007 (Vernon Supp. 1980). The Missouri statute also forbids adverse underwriting decisions made solely on the basis of cancellation or non-renewal by another insurer or requiring applicants to divulge whether such action had occurred. *Id.* It places restrictions similar to those found in the Minnesota law (*see* note 137 and accompanying text *supra*) regarding cancellations. *Id.* § 375.002 (Vernon Supp. 1980).

143. N.H. Rev. Stat. Ann. § 417:4(VIII)(e) (Supp. 1979).

144. Md. Ann. Code art. 48A, § 61A (1979). The Commissioner reviews the filing before accepting it.

145. N.Y. Ins. Law § 168-e (McKinney Supp. 1980-81).

146. Ins. Code § 143.26. Ill. Ann. Stat. ch. 73, § 755.266 (Smith-Hurd Supp. 1980-81). Case-by-case investigations resulted in fining one major insurer for violation of this section. *See* note 48 *supra*.

147. In such instances it may be necessary to rely on other state statutes of the Type IV or V variety. *E.g.*, Md. Ann. Code art. 48A, § 234A(b) (1979) forbids discrimination based on race, sex or religion of the insured and § 234B(d) forbids the termination of an agent based on the race, religion or sex of the agent or the policyholders. For other Type IV provisions, see Mo. Ann. Stat. § 375.007 (Vernon Supp. 1980); N.H. Rev. Stat. Ann. § 417:4(VIII)(e) (Supp. 1979); Fla. Stat. § 626.9541(24) (Supp. 1979); N.Y. Ins. Law § 40(10) (McKinney 1966), and Ins. Code § 143.21a, Ill. Ann. Stat. ch. 73, § 755.21a (Smith-Hurd Supp. 1980-81). The problems in applying Type IV statutes are discussed in note 155 and accompanying text *infra*.

NAIC Model Act in three important respects. First, it prohibits the termination of agents based solely on their geographical location or that of their books of business.[148] Second, it explicitly establishes a grievance procedure by which insureds and agents can complain about violations of the law.[149] Regulations issued to implement this section require companies to inform applicants, insureds and agents of the specific reasons for adverse decisions.[150] Regulations require decisional letters to contain a notice in bold face type stating that insurance redlining is illegal and describing the complaint mechanism.[151] Third, the implementing regulations also mandate aggregate public disclosure of underwriting activity and agent locations.[152] Unfortunately, the New York Act contains a loophole: "[s]uch prohibition shall not preclude an insurer from refusing to issue or renew or cancel such policy based on sound underwriting and actuarial principles reasonably related to actual or anticipated loss experience."[153]

The remaining two forms of legislation do not deal directly with the redlining issue. Eight states[154] have adopted *the fourth form of legislation* which prohibits *unfair* discrimination based on race. In those instances where redlining has a racial component these statutes might be interpreted as prohibiting redlining practices.

However, the absence of a legislative mandate directed specifically at redlining may temper a short-staffed insurance commis-

---

148. N.Y. Ins. Law § 115-a (McKinney Supp. 1979). Of course, this section could be circumvented by a showing that geographical location was not the *sole* cause of the termination (*e.g.*, poor loss ratios can be demonstrated) or by assigning no agents to a particular area.

149. N.Y. Ins. Law § 168-f (McKinney Supp. 1979).

150. 11 N.Y. Code of Rules & Reg. §§ 218.3(a), 218.4(a), 218.5(a) (1979).

151. THE NEW YORK INSURANCE LAW PROHIBITS INSURERS FROM ENGAGING IN REDLINING PRACTICES BASED UPON GEOGRAPHIC LOCATION OF THE RISK OR THE PRODUCER [*i.e.*, agent or broker]. IF YOU HAVE REASON TO BELIEVE THAT AN INSURER HAS ACTED IN VIOLATION OF SUCH LAW, YOU MAY FILE YOUR COMPLAINT ON AN OFFICIAL FORM WHICH CAN BE OBTAINED FROM [the following address and toll-free phone number].

Id. § 218.5(a).

152. *Id.* § 218.7. *See* notes 290-92 and accompanying text *infra*.

153. N.Y. Ins. Law § 168-e (McKinney Supp. 1979).

154. Ark. Stat. Ann. § 66-3005(11) (Supp. 1977); Cal. Ins. Code § 679.71 (West Supp. 1979); Ky. Rev. Stat. § 304.12-085 (Supp. 1978); Mont. Rev. Codes Ann. § 33-18-210(3) (1961); N.J. Stat. Ann. § 17:29B-4(7)(c) (West Supp. 1979); N.D. Cent. Code § 26-30-04(11) (1978); Pa. Stat. Ann. tit. 40, § 1171.5(a)(7)(iii) (Purdon Supp. 1979); Wash. Rev. Code Ann. § 49.60.176 (Supp. 1979).

sioner's interest in the problem. Further, it may be difficult to apply this form of legislation to more subtle forms of redlining. Finally, this type of legislation was found by the New York courts to be inapplicable to even the most blatant forms of redlining.[155]

Eighteen states have adopted *the fifth form of legislation*, which merely prohibits *unfair* discrimination between risks of the same class and hazards.[156] Although some insurance departments interpret these statutes to bar redlining,[157] it is not known whether this interpretation is capable of withstanding judicial scrutiny. Further, they accept present classification schemes as a given and within that would apparently permit a company to ignore all risks within a given classification. Further, it does not appear that agent terminations, even those with racial overtones, would be covered by this type of statute.

Most states have not adopted broad anti-redlining legislation

---

155. British & Foreign Marine Ins. Co. v. Stewart, 30 N.Y.2d 53, 330 N.Y.S.2d 340, 281 N.E.2d 149 (1972). Royal Globe Insurance Companies were charged with violating N.Y. Ins. Law § 40(10) (McKinney 1966), a typical Type IV statute: no insurance company "shall make any distinction or discrimination between persons because of race, color, creed or national origin, as to the premiums or rates charged for insurance policies or in any other manner whatever." It was alleged that defendants violated this provision by systematically cancelling fire insurance on *commercial* properties located in predominantly black neighborhoods in New York City in order to reduce their fire insurance exposure in ghetto and "riot-prone areas." 30 N.Y.2d at 57-60, 330 N.Y.S.2d at 342-44, 281 N.E.2d at 151-52. In Prospect Area Hous. Fund v. Schenck, 71 Misc. 2d 931, 934, 337 N.Y.S.2d 662, 665-66 (Sup. Ct. 1972), the court applied *Stewart* to residential redlining. Hence, until the 1979 amendments (discussed in notes 145, 148-53 and accompanying text *supra*) were adopted, insurance redlining in any form did not conflict with New York insurance laws.

156. Alaska Stat. § 21.36.120 (1966); Ariz. Rev. Stat. Ann. § 20-448(B) (1975); Colo. Rev. Stat. § 10-3-1104(f)(I) (Supp. 1979); Conn. Gen. Stat. Ann. § 38-172 (West 1969); Del. Code Ann. tit. 18, § 2304(15)(c) (1975); D.C. Code Ann. § 35-1333 (1973); Iowa Code Ann. § 507B.4(7) (West Supp. 1979); La. Rev. Stat. Ann. § 652 (West 1978); Me. Rev. Stat. tit. 24-A, § 2162(2) (1974); Neb. Rev. Stat. § 44-1525(7)(c) (1978); Nev. Rev. Stat. § 686A.130(4) (1979); Ohio Rev. Code Ann. § 3901.21(F) (Baldwin Supp. 1979); Okla. Stat. Ann. tit. 36, § 1204(7)(c) (West 1976); S.C. Code § 38-9-80 (1977); S.D. Comp. Laws Ann. § 58-33-26 (1978); Tenn. Code Ann. § 6-8-210 (1980); Utah Code Ann. § 31-27-22 (1974); W. Va. Code § 33-11-4(7)(c) (1975). *See also* N.C. Gen. Stat. § 58-44.3 (1977).

Variations on this form of legislation may also be found in Colo. Rev. Stat. § 10-3-1104(f)(II) (Supp. 1979) and Or. Rev. Stat. § 746.018(1) (1979) which differ from the typical form by forbidding discrimination of the same class and hazard between neighborhoods within a city. Although the Oregon legislation is limited in scope to Portland, the insurance commissioner in responding to the *1980 JLSP Survey*, *supra* note 8, remarked that if the commissioner felt such practices were occurring in other cities, he could exercise his power under Or. Rev. Stat. § 746.240 (1979), to define them as "unfair trade practices."

157. Colorado, Iowa and Nevada in responding to the *1980 JLSP Survey*, *supra* note 8, stated that their laws are interpreted to prohibit redlining; Louisiana, Maine, South Carolina, South Dakota and Tennessee responded that their laws are not.

However, statutory wording is not all-important. A comprehensive statute can be given minimal enforcement support; an ambiguous statute can be broadly interpreted. But ambiguous statutes have not generally been broadly interpreted; as anti-redlining activities have not traditionally been a priority area for insurance departments.[158]

A 1979 GAO report documents many of the institutional problems that confront state insurance departments and contribute to state lethargy in the redlining field. According to the report, departments are often grossly understaffed,[159] plagued by problems in the hiring and retention of trained staff due to low salaries,[160] and headed by "revolving door" commissioners.[161] The study also lends credence to the charge that departments are more sensitive to the problems of companies and agents than to consumer complaints. Historically, departments have focused their scarce resources in the direction of monitoring the rates[162] and financial sol-

158. There are, of course, exceptions to this generalization. In Michigan, for example, the Insurance Bureau spearheaded the fight for the Essential Insurance Act. *See* INSURANCE BUREAU, MICHIGAN DEP'T OF COMMERCE, ESSENTIAL INSURANCE IN MICHIGAN: AN AVOIDABLE CRISIS [hereinafter cited as MICHIGAN ESSENTIAL INSURANCE], *reprinted in Rights & Remedies*, *supra* note 53, at 553. Illinois has fined companies for redlining, as has Maryland. *See* MIDWEST CIVIL RIGHTS ADVISORY, *supra* note 3, at 6-7 and *1980 JLSP Survey*, *supra* note 8.

159. The quality and quantity of personnel vary widely. GAO REPORT, *supra* note 1, at 19-32, 34.

160. *Id.* at 32-35.

161. *See* note 104 and accompanying text *supra*.

162. In the wake of McCarran-Ferguson, every state except Illinois adopted rating laws. Although state rating laws follow at least nine different formats, they may be categorized as either "prior approval" or "open competition" laws. Under the former system, insurers are required to submit their rate proposals to the insurance department in advance for approval or modification. Under the latter system, insurers are not required to seek advance approval of their rates by the department: rates may be established at whatever level insurance companies determine is a competitive rate. However, residential property premiums under either law may not be excessive, inadequate or unfairly discriminatory. The GAO found evidence to support consumer group contentions that prior approval is merely a rubber stamp that fails to analyze filings. The GAO also found evidence supporting industry criticisms that the process is too restrictive and time-consuming and results in unrealistic cuts in requested rates. Time devoted to studying rate filings ranged from a few minutes to fourteen months. In the open competition states, it appears that even greater variations occur. As a result, the GAO found little difference in the price of insurance between open competition and prior approval states. *See generally* GAO REPORT, *supra* note 1, at 59-88, 93-101; *Fair Housing Hearings: 1978*, *supra* note 76, at 601 (statement of NAIC); U.S. DEP'T OF JUSTICE, THE PRICE AND MARKETING OF INSURANCE 1-11, 15-35 (1977), *reprinted in Antitrust Exemptions & Immunities, Hearings Before the Subcomm. on Monopolies & Commercial Law, House Comm. on the Judiciary* 117-27, 131-51 (1977) [hereinafter cited as *Antitrust Exemptions*].

vency[163] of insurance companies. Consumer complaints[164] and redlining problems have not been a major priority for these departments. Few state insurance departments have conducted studies of insurance redlining;[165] most wait for complaints and then investigate on a case-by-case basis.[166] Even fewer collect data as to where policies are written.[167]

Similarly, the power to prohibit "excessive, inadequate or discriminatory rates," that exists in virtually all states,[168] has generally been ignored as a weapon for controlling "legitimized redlining" by means of territorial and classification ratings. Although this power would be an especially effective weapon where rating territories coincide with racial concentrations, it could be used in other circumstances. Nevertheless, insurance departments appear reluctant to use it: the GAO study showed little state analysis of the validity and rationale for specific rating territories and classifications.[169]

The lack of state enforcement activity can be explained to a large degree by the political calculus of the field. Insurance companies are a powerful lobby, with considerable weight in the departments. In contrast, it is often difficult for community groups to

---

163. GAO Report, *supra* note 1, at 36-41. Indeed, "price regulation emerged not because rates were too high, but because they were too low. The impetus for uniform ratesetting was solvency . . . . " *Id.* at 59.

164. *Id.* at 31-32, 41-57.

165. Illinois and Michigan were the only states which in responding to the *1980 JLSP Survey*, *supra* note 8, indicated that they have conducted wide-scale inquiries into the redlining problem. Of the states which did not respond to our survey, the following told the GAO that they had conducted studies on redlining between 1974 and 1978: Arizona, California, Kentucky, Maryland, Massachussets, Pennsylvania, West Virginia and Wisconsin. GAO Report, *supra* note 1, at 147.

166. Iowa, Kansas, Minnesota, Montana, Wyoming and Virginia are among the states responding to the *1980 JLSP Survey*, supra note 8, that rely on case-by-case investigations.

167. Of the states responding to the *1980 JLSP Survey*, *supra* note 8, only Georgia, Illinois, Minnesota and New York indicated that they require disclosure of underwriting activity by ZIP code. Illinois (Ins. Code § 143.25, Ill. Ann. Stat. ch. 73, § 755.25 (Smith-Hurd Supp. 1980-81) and Minnesota (Minn. Stat. Ann. § 65A.28 (West Supp. 1980) mandate such disclosure by statute. In New York, authority is derived from the broad statutory language prohibiting redlining (*see* notes 145, 148-53 and accompanying text *infra*) and grant of power to the Commissioner to issue regulations. 11 N.Y. Code of Rules & Reg. § 218.7 (1980). *See also* Ga. Ins. Reg. 120-2-15-.04 (1979). The New York and Georgia regulations suggest that if insurance commissioners wished to commit their resources towards gathering essential data for addressing the redlining problem, such authority could be found. For discussion of the disclosure issue, see notes 269-92 and accompanying text *infra*. *See also* note 269 for discussion of Missouri disclosure law.

168. GAO Report, *supra* note 1, at 137-42.

169. *Id.* at 141.

mobilize in this field.[170] Few consumers are aware of their rights and remedies.[171] Cancellations, nonrenewals, refusals to write, and the charging of excessive rates are individualized discriminatory practices. Although the summary effect of discrimination is to write-out or rate-out entire segments of urban populations, the process toward that end is carried out on a one-to-one relationship between consumer and company. In most cases, the industry's incremental exclusion of "undesirables" does not excite mass opposition from redlined policyholders. Often the individual does not see his or her problem as part of a community-wide phenomenon. In addition, community groups frequently find it difficult to vent their frustrations against a given insurer. The company's main regional office may not be in their neighborhood, and its headquarters may be hundreds of miles away. Beyond that, insureds find it difficult to target their opposition. The industry is replete with firms of all types and sizes. Insureds often cannot choose the company against which their lobbying would be most effective.[172] Hence, rather than consumer impotence being surprising, the fact that pressures for expanded anti-redlining actions have grown immensely in recent years is unusual indeed.

4. Holtzman Amendment. Traditionally, it has been Washington, rather than the statehouse, which has been most receptive to claims from civil rights and urban constituencies. It is not surprising that community groups have directed pressures at Congress to alleviate perceived FAIR abuses. In 1978, in response to these pressures, Congress passed the Holtzman Amendment,[173] which sought to end price and service disparities by conditioning eligibil-

---

170. Squires argues that while in some instances community organizations have been able to influence regulatory activities, the industry has been more effective in communicating its views to public officials. "To rely on community group pressure as a check on recalcitrant regulators is inadequate particularly when confronted with a well paid, knowledgable ever present army of industry lobbyists." G. Squires, ". . . Unless Such Decision Is For a Business Purpose . . ." 2 (Statement Before the Property & Casualty Comm. of the NAIC on Proposed Model Unfair Trade Practice Amendments to Prohibit Redlining, June 7, 1979).

171. This was underlined by a recent survey of Chicago area residents by WBBM-TV which found that 90% of the respondents did not know that there was a state office that they could go to for help in resolving insurance problems. MIDWEST CIVIL RIGHTS ADVISORY, *supra* note 3, at 1.

172. The contrast may be drawn to mortgage redlining, where community group demonstrations and threats to withdraw capital from the one neighborhood savings and loan has often resulted in commitments from the institution to increase credit availability.

173. Pub. L. No. 95-537, 92 Stat. 2097, 2098 (codified at 12 U.S.C. § 1749bbb-3 (Supp. III 1979)).

ity for riot reinsurance on compliance with its "public membership" and "fair rates" sections.[174] The former provision mandates that at least one-third of the voting members of each plan's governing board consist of individuals not employed by the insurance industry. The latter prohibits FAIR risks from being charged higher than the advisory rates set by the principal rating organization for voluntary market property insurance.

The legislation quickly eased the plight of FAIR insureds in several states. Connecticut's rates dropped by twenty-five percent, Delaware's by thirty percent and Wisconsin's by thirty-five percent.[175] In other states, the legislature chose to do without federal riot reinsurance, rather than comply with the new federal standards. Iowa, Minnesota, Missouri, New York, Oregon and Virginia did not comply with either provision and FAIR insureds continue to pay more for less coverage.[176] Because the FAIR plans of California, Indiana, Kansas, Louisiana and Puerto Rico do not comply with the "public membership" sections, these states are no longer eligible for federal riot reinsurance.[177] These eleven jurisdictions accounted for over thirty percent of FAIR policies written in 1979.[178]

In effect, the response to the Holtzman Amendment demonstrates that the industry is now less fearful of catastrophic riots. FAIR has been costly—during their first decade, the plans suffered an operating loss of $335 million[179]—although these losses are

---

174. *Id.* These provisions became effective January 31, 1979.

175. *1980 Senate Banking Hearings*, *supra* note 36, at 24, 35 (testimony of Rep. Holtzman). Variable surcharges were also eliminated in Kansas and Kentucky and proposed large rate increases were averted in Illinois and Maryland. *Id.*

176. Minnesota still imposes a 25% fire premium on all FAIR risks. Virginia charges FAIR risks 25% more and Oregon charges an additional 25% for non-owner-occupied dwellings. Iowa and Missouri charge some classes as much as 25% and 120% additional, respectively. *Id.* at 35. In New York, the Holtzman Amendment resulted in intense conflict between the insurance industry on the one hand and community groups supported by the state insurance superintendent on the other. *Id.* at 21, 44-45 (testimony of FIA Administrator Jimenez). The resulting compromise was legislation prohibiting redlining in its narrow definition (see notes 145, 148-53 and accompanying text *supra*), mandating disclosure of underwriting activity, and capping FAIR rates at 20-40% (depending on type of structure) above the Insurance Service Office's advisory rates (previously they were 300% over comparable voluntary market levels). N.Y. INS. LAW §§ 168-e, 168-f, 273 (McKinney Supp. 1980-81).

177. *1980 Senate Banking Hearings*, *supra* note 36, at 22, 45 (testimony of FIA Administrator Jimenez).

178. FIA 1980 Data Sheet, *supra* note 41.

179. NAIC 90 Day Report, *supra* note 16, at 39. New York's FAIR Plan alone lost more than $30 million, despite self-rating. *1980 Senate Banking Hearings*, *supra* note 36, at

redistributed among policyholders either directly or indirectly.[180] Companies further fear the UPPRA as the first step in greater federal involvement curtailing underwriting discretion or mandating the provision of other costly forms of coverage in the residual market (*e.g.*, homeowners' coverage). Indeed, the industry insists that rate disparities are needed to deter homeowners from fleeing the voluntary market toward the FAIR plans.[181] Thus, one of the effects of the Holtzman Amendment has been further erosion of political support for the renewal of the riot reinsurance act.[182] The industry, although no longer fearful of riots, is fearful of federal intervention[183] and generally prefers to see an end to the riot reinsurance program rather than face the Holtzman Amendment controls. Indeed, some segments of the industry oppose any renewal of the program.[184] Despite the lack of unanimity among state insurance commissioners, the NAIC's desire to preserve state domination in the field has resulted in the association's opposition to the present program.[185] Clearly, the future of the Act is in doubt.

But is the Holtzman Amendment the monster its critics depict it to be? As noted above, state insurance departments have not demonstrated great aggressiveness in tackling the redlining problem. Voluntary market abuses are well-documented.[186] State politi-

---

263, 269. In contrast, FAIR has been very profitable for the federal government. From the inception of the riot reinsurance program to September 30, 1977, the FIA has collected over $100 million of riot reinsurance premiums from private companies and paid excess riot-related loss of $12 million. *Id.* at 483.

180. *See* note 111 *supra*. Furthermore, it is interesting to note that the industry has been more profitable in FAIR than in non-FAIR states. *1980 Senate Banking Hearings*, *supra* note 36, at 183, 187 (memorandum from FIA Administrator Jimenez to NAIC Executive Committee).

181. *Id.* at 295-97 (responses submitted by Alliance of American Insurers).

182. An FIA survey of insurance commissioners in states with FAIR plans listed eleven supporting continuation of the riot reinsurance program and five opposing it. *Id.* at 22 (testimony of FIA Administrator Jimenez). Sixty percent of the companies which purchased riot reinsurance favored the program's continuance.

183. *See, e.g.*, *id.* at 265 (testimony on behalf of American Insurance Association); 280-92 (responses submitted by Alliance of American Insurers).

184. Companies belonging to the American Insurance Association were split (*id.* at 262, 270-71); the Alliance of American Insurers opposes renewal (*id.* at 277-78, 282); as does the National Association of Independent Insurers (*id.* at 511); and the National Association of Professional Insurance Agents (*id.* at 515).

185. *Id.* at 326-29. If the program is to continue, the NAIC advocates the elimination of the state layer of insurance (*see* note 36 *supra*) and the Holtzman Amendment. *See also id.* at 477-78 (testimony of Maryland Insurance Commissioner Birrane). *But see id.* at 498-501 (statements of insurance commissoners of New Jersey, Pennsylvania and New York supporting continuation of the UPPRA program).

186. *See* notes 58-91 and accompanying text *supra*.

cal systems appear unable to address competing demands. Federal agencies are perhaps best equipped to perceive national patterns in redlining and devise a national solution. It was the federal government's initial work in this field that spurred community action.[187]

Indeed, the Holtzman Amendment may be criticized for not going far enough. For example, it does not address the problems of servicing, limited coverage, and surcharges due to additional inspections or the stigma of the residual pool.[188] It must also be kept in mind that advisory rates, particularly in open competition states, may be higher than effective insurance rates. Furthermore, the Holtzman Amendment does not respond to the fundamental issues of territories and classifications or agent accessibility. Indeed, the appropriate answer to the withdrawal of eleven states from UPPRA participation might be more direct federal regulation, rather than less.

III. Possible Approaches to Counter Insurance Redlining

A. SHORT-RUN

1. Title VIII Litigation. In examining possible alternatives for curbing insurance redlining, one is immediately struck by the practice's racial implications. Redlining systematically discriminates against the urban core and its residents because older structures and "undesirable" neighborhoods are disproportionately located there. Consequently, in addition to frustrating national housing policy, the refusal to write affordable policies may constitute *de facto* discrimination against blacks who represent more than twenty-two percent of the urban population nationwide and a much larger percentage in several major cities.[189] Furthermore, HUD has discovered that industry practices have:

> an undeniable [intra-city] racial component. Redlined areas often coincide with nonwhite neighborhoods . . . . [Redlining] extends far beyond blighted urban areas into many otherwise healthy neighborhoods . . . . The tentacles of these crises [*i.e.*, availability and affordability] reach into diverse areas of mortgage financ-

187. Hearings by the FIA and reports such as Full Insurance Availability, *supra* note 23, and Insurance Crisis, *supra* note 8. *See* Midwest Civil Rights Advisory, *supra* note 3, which is also an important study backing charges by community groups.

188. *See* notes 39-51 and accompanying text *supra*.

189. *E.g.*, U.S. Dep't of Commerce, 1970 Census of Population, vol. I (Characteristics of Population) (1973). Table 16, indicates that Atlanta was 51.6% nonwhite, Chicago 34.4%, Detroit 44.5%, and the District of Columbia 72.37%. *Id.*

ing and property appraisals thereby denying credit and sealing the doom of today's vital urban neighborhoods.[190]

Empirical data from New York City and Chicago support HUD's finding of a relationship between a neighborhood's racial composition and insurance market activity.[191] Minority concentrations in both cities are the best predictors of residual market activity ($r = .81$ in New York and .72 in Chicago), far stronger than the age of structure ($r = .47$ and .48, respectively). In New York City, the correlation coefficient describing the link between neighborhood racial composition and involuntary market activity was greater than the coefficients linking market activity and the percentage of neighborhood buildings with more than one building code violation ($r = .64$), the number of vacant structures ($r = .69$), and the number in tax arrearage ($r = .76$). In Chicago, the coefficient linking race and involuntary market activity was greater than that for fires ($r = .71$) and median income ($r = -.66$). Data from these two cities strongly suggest that racial considerations play an important role in underwriting decisions.[192]

That this behavior is commonplace in an industry which provides a service as vital as property insurance has devastating implications for the housing opportunities of minorities. Disinvestment and building abandonment in redlined areas is accelerated by skyrocketing maintenance and operating costs. Families with the means to do so flee redlined areas, leaving behind the higher insurance costs and the stigma of the residual market. Hard-pressed owners who have foregone property insurance coverage lack the financial capacity to rebuild after a fire. White flight, which accompanies disinvestment, almost invariably leads to accelerated racial and economic segregation.

---

190. INSURANCE CRISIS, *supra* note 8, at 443-44.

191. Chicago data is from MIDWEST CIVIL RIGHTS ADVISORY, *supra* note 3, at 34-40 and is discussed in Squires, DeWolfe & DeWolfe, *Urban Decline or Disinvestment: Uneven Development, Redlining and the Role of the Insurance Industry*, 27 SOC. PROB. 79, 81-85 (1979). These studies analyzed both voluntary market activity (defined by the ratio of new and renewal homeowners' policies minus cancellations and nonrenewals per 100 housing units) and involuntary market activity (new and renewal FAIR policies per 100 housing units) by ZIP code. The author also performed statistical analysis on raw data for FAIR plan activity and demographic data in 66 selected New York City neighborhoods listed in Appendix F of INSURANCE CRISIS, *supra* note 8, at 81-85. Squires, DeWolfe & DeWolfe, *supra*, at 87, advise caution in interpreting such data; it does not reflect subtle, yet potent forms of redlining, *e.g.*, variation in costs, coverage or terms under which insurance is available.

192. *See also* INSURANCE CRISIS, *supra* note 8, at 35-36.

The empirical data discussed above must not be viewed in isolation from historical practices of the real estate industry, of which insurance firms are important elements. The literature of the field traditionally characterized neighborhood age and racial change as symptoms of decline.[193] The Federal Housing Administration,[194] realtors,[195] appraisers,[196] lenders[197] and insurers perpetuated this characterization and made it a reality through redlining, blockbusting and racial steering. The result, a self-fulfilling proph-

193. The theoretical basis for these practices is the "filtering model." As properties and neighborhoods get older, homes filter down into the hands of poorer and less capable people until they finally become slums. The initial stages of this process are characterized by racial change and social tensions. Biases are still present in contemporary manuals. For example, McMichael's Appraising Manual 114-16 (1975), *quoted in* United States Amicus Curiae Brief in United States v. American Inst. of Real Estate Appraisers, 442 F. Supp. 1072 (N.D. Ill. 1977), *reprinted in Rights & Remedies*, *supra* note 53, at 867. Real Estate Study & Guide (1976), published by the State of California Department of Real Estate, advised that "[t]he value of a residential neighborhood is affected primarily by the social characteristics of the people . . . . The lack of homogeneity may affect the neighborhood's present and future desirability." *Quoted in* Office of the Ass't. Sec. for Fair Housing & Equal Opportunity, U.S. Dep't of Housing & Urban Development, Redlining & Disinvestment as a Discriminatory Practice in Residential Mortgage Loans, pt. I, at 33 [hereinafter cited as Redlining & Disinvestment]. The American Institute of Real Estate Appraisers advised that appraisers must recognize "that values change when people advance into and infiltrate a neighborhood." The Appraisal of Real Estate 90 (5th ed. 1967), *quoted in* Redlining & Disinvestment, *supra*, pt. I, at 31-32. *See generally id.* pt. I, at 31-33; pt. II, at 35-38, 41, 76-78. One may contrast this with the statements of the proponents of the Fair Housing Act, *i.e.*, that the contrived per se relationship between race and property values was a myth. *See, e.g.*, 114 Cong. Rec. 2692 (1968) (Sen. Mondale introducing a study by Luigi Laurenti).

194. *E.g.*, in introducing the Fair Housing Act, Senator Mondale called Congress' attention to the role of the FHA, Veterans' Administration and other federal agencies in encouraging white flight from the urban core, leaving blacks and other minorities behind and unable to take advantage of liberalized credit opportunities. 114 Cong. Rec. 2278 (1968). *See also* Redlining & Disinvestment, *supra* note 193, pt. I, at 4.

195. Until 1950, the Code of Ethics of the National Association of Real Estate Boards counselled its members to maintain segregated neighborhoods in the interest of maintaining property values. Zuch v. Hussey, 394 F. Supp. 1028, 1054 n.12. (E.D. Mich. 1975). For a discussion of the role of real estate brokers in accelerating segregation trends, see Note, *Blockbusting: A Novel Statutory Approach to an Increasingly Serious Problem*, 7 Colum. J.L. & Soc. Prob. 538, 539-45 (1971), and Note, *Racial Steering: The Real Estate Broker and Title VIII*, 85 Yale L.J. 808, 809-12 (1976).

196. Plaintiff's brief, app. A, United States v. American Inst. of Real Estate Appraisers, 442 F. Supp. 1072 (N.D. Ill. 1977), *reprinted in Rights & Remedies*, *supra* note 53, at 882-83. *See also* note 193 *supra*.

197. Redlining & Disinvestment, *supra* note 193, pt. I, at 61-62. Note, *Redlining: Potential Civil Rights & Sherman Act Violations Raised by Lending Policies*, 8 Ind. L. Rev. 1045, 1045 nn.1-3 (1975). Office of the Ass't Sec. for Fair Housing & Equal Opportunity, U.S. Dep't of Housing & Urban Development, Private Lending Institutions Questionnaire, Initial Report on Returns, Apr. 25, 1972, *reprinted in Rights & Remedies*, *supra* note 53, at 886-89. *See also* notes 219-23 and accompanying text *infra*.

ecy, contributed to the decline of central cities, the spread of ghettoes and the growth of suburbia.[198]

Finally, it must be remembered that insurance underwriting is more art than science.[199] It is often more impressionistic than empirical.[200] Preconceptions are reinforced by an underwriter's or agent's contact with his or her counterparts throughout the industry.[201] Traditional economists argue that unfair discrimination cannot exist in the long-run because non-discriminatory firms will enter the market and absorb the unsatisfied demand. However, new entry is probably not a remedy in the insurance industry because a firm entering the market faces high start-up costs and state regulation, including surplus[202] and rate approval requirements.[203] Moreover, the firm functions in an industry that rewards conservatism.[204] And the consumer is not always free to avoid the discriminating supplier; insurance is necessary for mortgage credit. Hence, consumer elasticity is extremely low and vulnerability is very high.

The racial implications of insurance redlining strongly suggests that the practice is a violation of the civil rights laws.[205]

---

198. According to the NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 101 (1969):

> There was evidence of a tacit agreement among all groups—lending institutions, fire insurance companies and FHA—to block off certain areas of cities within "red lines" and not to loan or insure within them. The net result, of course, was that the slums and the areas surrounding them went downhill faster and faster than before.

199. Indeed, studies of the automobile industry found that only 30% of the variance in accident rates is predictable from classification systems. Casey, Pezzier & Spetzler, *The Role of Risk Classifications in Property and Casualty Insurance. A Study of the Risk Assessment Process*, 14-15 (1976), *cited in* MIDWEST CIVIL RIGHTS ADVISORY, *supra* note 3, at 19.

200. MICHIGAN ESSENTIAL INSURANCE, *supra* note 158, at 10, *reprinted in Rights & Remedies*, *supra* note 53, at 566. A. Valukas, *supra* note 66, *reprinted in Rights & Remedies*, *supra* note 53, at 358.

201. *See* note 193 *supra* and note 204 *infra*.

202. By requiring the maintenance of a certain ratio of surplus-to-premiums written, state legislation provides an incentive for companies to seek only the most desirable risks.

203. *See* note 164 *supra*.

204. *See* note 65 *supra*.

205. The ensuing discussion addresses the question of whether insurance redlining violates the Fair Housing Act, 42 U.S.C. §§ 3601-3631 (1976 & Supp. II 1978) [hereinafter cited as the Fair Housing Act or Title VIII]. However, it must be noted that the Civil Rights Acts of 1866 and 1870 also provide for a number of protections of individual rights guaranteed by the thirteenth amendment. All persons are guaranteed equal rights to make and enforce contracts (42 U.S.C. § 1981 (1976)) and to inherit, purchase, lease, sell or hold real and personal property (42 U.S.C. § 1982 (1976)). Insurance is both a contract and a personal property right. *See* Ben v. General Motors Acceptance Corp., 374 F. Supp. 1199 (D. Colo. 1974); Sims v. Order of United Commercial Travelers of Am., 343 F. Supp. 112, 114 (D.

When Congress enacted the landmark Fair Housing Act of 1968, it was well-aware of the problems of urban deterioration and unrest that had been caused in part by redlining practices, and of the impact of these practices in limiting housing opportunities for the poor and urban minorities.[206] Congress enacted a broad prohibition in section 804(b) of the Act, making it unlawful to "refuse to sell or rent after the making of a bona fide offer, or refuse to negotiate for the sale or rental of, *or otherwise make unavailable or deny*, a dwelling to any person because of race, color, religion or national origin."[207]

The courts have given great sweep to these provisions. In *Trafficante v. Metropolitan Life Insurance Co.*, the Supreme Court stated that the Act is an attempt to replace the ghettoes with "truly integrated and balanced living patterns."[208] The statute was intended to protect all persons, white as well as black, from the "loss of important benefits of racial association."[209] In *Jones v. Alfred H. Mayer Co.*, the Court described the Fair Housing Act as a "detailed housing law, applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of

---

Mass. 1972). In Jones v. Alfred H. Mayer Co., 392 U.S. 409, 421-22 (1968) and Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237 (1969), the Court indicated that it would construe § 1982 quite liberally. For application of this principle in a "non-traditional" discrimination case, see Clark v. Universal Builders, Inc., 501 F.2d 324, 328-34 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974) (exploitation of dual housing market by contractor and vendors by charging higher prices or providing less favorable terms in black communities). In Note, *Michigan's Redlining Law*, 1978 DET. C.L. REV. 599, 605-06 (1978) and Note, *supra* note 197, at 1050-52, the authors urge an extension of this principle to mortgage redlining. Yet it is unclear exactly how far §§ 1981 and 1982 sweep—dictum in *Jones* indicates that the Fair Housing Act may go further in proscribing activities. *See* 392 U.S. at 413-14, 417. *See also* Love v. DeCarlo, 482 F.2d 613 (5th Cir.), *cert. denied*, 414 U.S. 1115 (1973) and Note, *Housing and Section 1982: The Advisability of Extending the Statutory Mandate Beyond Acts of Traditional Discrimination*, 1975 DUKE L.J. 781, 787-91, 798-800. In any event, it is difficult to imagine redlining in the residential market that would be in violation of §§ 1981 and 1982 but not the Fair Housing Act. The courts which have examined questions of both mortgage and insurance redlining (*see* notes 219-39 and accompanying text *infra*) have not examined § 1981 or § 1982 claims.

206. *E.g.*, Charles Abrams' book FORBIDDEN NEIGHBORS (1955), which was extensively quoted during debates on the Act, listed among the most important problems limiting the availability of housing for minority groups their inability to obtain fire insurance. *Id.* at 178.

207. 42 U.S.C. § 3604(b) (1976) (emphasis added).

208. 409 U.S. 205, 211 (1972) (quoting Sen. Mondale, 114 CONG. REC. 3422 (1968)).

209. 409 U.S. at 209-10. In affirming a municipality's standing to sue local realtors for racial steering under the Fair Housing Act, the Supreme Court asserted that "[t]here can be no question about the importance to a community of promoting stable, racially integrated housing." Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 111 (1979).

federal authority."[210]

Courts have held that the Act regulates not only the direct sale and rental of housing, but also a wide variety of other practices which collectively "make unavailable or deny" housing opportunities and thus frustrate the goal of racially integrated neighborhoods.[211] These activities include racial steering,[212] blockbusting,[213] discriminatory newspaper real estate advertisements,[214] the rejection of minority orphans by an orphanage,[215] racially exclusive land use policies,[216] discriminatory appraisal practices[217] and the withdrawal of a city's application for community development funds in an attempt to maintain segregated housing.[218]

In 1976, two district courts held that the Fair Housing Act prohibits the refusal to lend, or the imposition of less favorable mortgage loan terms or conditions, because of a neighborhood's racial composition.[219] In *Laufman v. Oakley Building & Loan Co.*,

210. 392 U.S. at 417. The Fair Housing Act was designed "to provide within constitutional limitations for fair housing throughout the United States."

211. In *Trafficante*, the Supreme Court asserted that the Fair Housing Act is to be accorded a "generous" construction so that it could accomplish the "enormous" task that Congress contemplated for it. 409 U.S. at 211, 212. *See also* Park View Heights Corp. v. City of Black Jack, 605 F.2d 1033, 1036 (8th Cir. 1979). In Otero v. New York City Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1974), the Second Circuit stressed the importance of the Act's goals and held that they supersede the otherwise racially neutral tenant assignment practices of the City Housing Authority. In Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 111 n.24 (1979), the Supreme Court also explicitly noted the relationship between housing integration and the achievement of school integration.

212. United States v. Mitchell, 580 F.2d 789, 791 (5th Cir. 1978); Wheatley Heights Neighborhood Coalition v. Jenna Resales Co., 429 F. Supp. 486, 488-89 (E.D.N.Y. 1977); United States v. Real Estate One, Inc., 433 F. Supp. 1140, 1144, 1152 (E.D. Mich. 1977); Fair Hous. Council v. Eastern Bergen County Multiple Listing Serv., Inc., 422 F. Supp. 1071, 1075-76 (D.N.J. 1976); Zuch v. Hussey, 394 F. Supp. 1028, 1047-49 (E.D. Mich. 1975), *aff'd* 547 F.2d 1168 (6th Cir. 1977). *See also* Note, *supra* note 105, at 812-21, 823-24.

213. United States v. Bob Lawrence Realty, Inc., 474 F.2d 115, 119-22 (5th Cir.), *cert. denied*, 414 U.S. 826 (1973); Zuch v. Hussey, 394 F. Supp. 1028, 1049-50 (E.D. Mich. 1975), *aff'd* 547 F.2d 1168 (6th Cir. 1977).

214. United States v. Hunter, 459 F.2d 205, 209-11, 214-15 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972).

215. United States v. Hughes Memorial Home, 396 F. Supp. 544 (W.D. Va. 1975).

216. Metropolitan Hous. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1294 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978). United States v. City of Black Jack, 508 F.2d 1179, 1184, 1186-87 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); United States v. City of Parma, E.O.H. Rep. (P-H) ¶ 13,616 (N.D. Ohio 1973).

217. United States v. American Inst. of Real Estate Appraisers, 442 F. Supp. 1072, 1078-79 (N.D. Ill. 1977).

218. Angell v. Zinsser, 473 F. Supp. 488, 500-01 (D. Conn. 1979).

219. Harrison v. Heinzeroth, 414 F. Supp. 66 (N.D. Ohio 1976); Laufman v. Oakley, 408 F. Supp. 489 (S.D. Ohio 1976).

the court examined at length the factors that prompted the Act's passage: the violent 1967 riots and the report of the National Advisory Commission on Civil Disorders.[220] The Commission's report detailed the roles of white flight and institutional disinvestment in the creation of ghettoes of despair and the incitement of disorder.[221] "The practical effect [of redlining] is to discourage whites—who may freely move elsewhere—from moving into vacancies in 'changing neighborhoods', thereby inducing 'massive transition' and ultimately 'white flight'."[222] Further, "the cost of housing being what it is today, a denial of financial assistance in connection with the sale of a house would effectively 'make unavailable or deny a dwelling.' When such denial occurs as a result of racial considerations, [section 804(b) of the Act, 42 U.S.C.] § 3604 is transgressed."[223] Hence, the court examined both the legislative history and the plain meaning of the statute and found Title VIII violations.

It was only a short leap from the premise that denial of financial assistance is a violation of the Act to the assertion that making property insurance unavailable or unaffordable on the basis of race or national origin is a violation. In *Dunn v. Midwestern Indemnity Co.*,[224] plaintiffs were black homeowners, residing in a predominantly black neighborhood, whose coverage was not renewed when their agent's business portfolio was terminated. Plaintiffs alleged that their loss of homeowners' insurance "was directly related to the location of their residence in a predominantly black neighborhood, the fact that they [were] black, and to the racial composition of the[ir agent's] portfolio of homeowners' insurance."[225] The court observed that the language "otherwise make unavailable or deny" has been construed to be "as broad as Congress could have made it."[226] Noting the connection drawn in *Lauf-*

220. 408 F. Supp. at 496-97.

221. Nat'l. Advisory Commission on Civil Disorders 244, 245 (1968) *quoted in* 408 F. Supp. at 496.

222. 408 F. Supp. at 497.

223. *Id.* at 493. In *Laufman*, the court also found that plaintiffs stated a cause of action under 42 U.S.C. § 3605 (1976) (discrimination in the financing of housing) and § 3617 (unlawful interference with the exercise of rights under §§ 3603-3606). The *Harrison* opinion was not explicit as to precise protections being infringed.

224. 472 F. Supp. 1106 (S.D. Ohio 1979).

225. Complaint at 2, 472 F. Supp. 1106 (S.D. Ohio 1979).

226. 472 F. Supp. at 1108, citing United States v. Youritan Constr. Co., 370 F. Supp. 643, 648 (N.D. Cal. 1973), *aff'd as modified*, 509 F.2d 623 (9th Cir. 1975) and Zuch v. Hussey, 366 F. Supp. 553, 557 (E.D. Mich. 1973). *See also* United States v. City of Parma,

man between financing and the availability of suitable housing,[227] the district court continued:

> the availability of appropriate insurance is a necessary predicate to the availability of financing, and financial assistance is a precondition to securing availability of adequate housing. [Thus,] a discriminatory denial of insurance would prevent a person economically able to do so from buying a house. Consequently, although insurance redlining is not expressly proscribed by the Act, it is encompassed by both the broad language of § 3604(a) and the legislative design of the Act which seeks to eliminate discrimination within the housing field.[228]

The Court also relied heavily on HUD's interpretation of insurance redlining as a Title VIII violation.[229]

Whether the *Dunn* rule will be adopted by other courts is unclear at this time. The defendants in *Dunn* first sought to distinguish *Laufman*[230] on the basis of the congressional policy, reflected in the McCarran-Ferguson Act and implicit in UPPRA, that insurance is a subject of state regulation.[231] This attempt failed, however, because the McCarran-Ferguson exemption has not been construed as a bar to federal relief for violations of constitutional rights[232] —rather, it deals with the general day-to-day regulation of

---

E.O.H. REP. (P-H) ¶ 13,616, 14,015 (N.D. Ohio 1973).

227. 472 F. Supp. at 1109.

228. *Id.*

229. *Id.* (quoting Memorandum of the General Counsel of the Dep't of Housing & Urban Development to Chester Maguire, Ass't Sec. for Equal Opportunity, Aug. 15, 1978. The court (*id.* at 1109) noted that agency interpretations were to be given great weight, citing *Trafficante*, 409 U.S. at 210, and *Gladstone*, 441 U.S. at 107. *But cf.* General Electric v. Gilbert, 429 U.S. 125 (1976) (improper to give such weight where EEOC was not granted specific authority to promulgate rules under Title VII and guidelines were not contemporaneous with the statute's enactment).

230. 472 F. Supp. at 1111-12.

231. Brief for Defendant Midwestern at 2-3, 472 F. Supp. 1106 (S.D. Ohio 1979). In contrast, savings and loans are clearly under federal supervision.

232. In Ben v. General Motors Acceptance Corp., 374 F. Supp. 1199 (D. Colo. 1974), the court denied a motion to dismiss plaintiff's claim of 42 U.S.C. §§ 1982 and 1985 violations, based on claims of higher risk casualty insurance to Navajo Indians:

> There is no indication in the background and history of the McCarran Act or its application that the McCarran Act was intended to deprive a citizen of access to the Federal Courts to obtain redress for violations of his civil rights and require him to resort to the state courts as the sole forum for redress. If such was the intention of Congress, it is highly questionable that Congress had the power under the Constitution to do so.

374 F. Supp. at 1203. Further, in two suits alleging sex discrimination in the terms and conditions of insurance, pursuant to 42 U.S.C. §§ 1983 and 1985(3), the McCarran-Ferguson

the insurance industry. The defendants' second argument was that Congress, in addressing the insurance redlining problem in 1968, could have explicitly barred the practice as part of the Fair Housing Act, but chose not to do so.[233] This argument was also rejected because Title VIII has been judicially expanded to prohibit other activities not explicitly barred by the Act.[234] If racially motivated denials of mortgages are illegal, it only follows that making insurance unavailable on these grounds (which may result in an inability to obtain a mortgage or make it more difficult to buy or sell property), should also be prohibited.

Finally, defendants argued that because of the existence of the Ohio FAIR plan, discrimination could not exist; the plan provides insurance for these higher risks. In contrast, no residual mechanism exists in the lending market. The argument was thus made that *only* mortgage redlining is proscribed by Title VIII.[235] This reasoning is similar to that accepted by the New York Court of Appeals in construing a statute prohibiting discriminatory practices by insurers in *British & Foreign Marine Insurance Co. Ltd. v. Stewart*.[236] However, the New York case may be distinguished. First, it was not brought pursuant to the broad Fair Housing Act, with its rich legislative history which calls for a "generous interpretation."[237] Second, the case involved commercial, not residential risks, and it must be recognized that different considerations are involved.[238] Furthermore, the experience of FAIR insureds over the past decade may require a re-thinking of some of *British & Foreign Marine*'s premises with respect to the actual harm to residual

---

Act was not discussed. *See* Reichardt v. Payne, 396 F. Supp. 1010 (N.D. Cal. 1975); Stern v. Massachussets Indemnity and Life Ins. Co., 365 F. Supp. 433 (E.D. Pa. 1974). *See also* North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971) ("[s]tate policy must give way when it serves to hinder vindication of federal constitutional guarantees"). An action under the Fair Housing Act is designed to enforce rights granted by the thirteenth amendment. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

233. Brief for Defendant Midwestern at 6, 472 F. Supp. 1106 (S.D. Ohio 1979). In contrast, 42 U.S.C. § 3605 (1976) explicitly prohibits discrimination in the financing of housing.

234. *See* notes 211-18 and accompanying text *supra*.

235. Brief for Defendant Midwestern at 3, 472 F. Supp. 1106 (S.D. Ohio 1979).

236. *See* note 155 *supra*.

237. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211, 212 (1972). *See generally* notes 206-18 and accompanying text *supra*. In addition, different tests may be required by different statutes.

238. It should be noted, however, that a lower New York court found the residential-commercial distinction irrelevant. Prospect Area Hous. Fund v. Schenck, 71 Misc. 2d 931, 934, 337 N.Y.S.2d 662, 665-66 (Sup. Ct. 1972).

insureds.

In the final analysis, effective use of Title VIII as a weapon against insurance redlining may depend on the courts' willingness to apply a discriminatory impact test rather than a discriminatory motivation test.[239] Indeed, anti-redlining activists have not imputed a malevolent intent to discriminate to insurance companies. The ultimate answer as to which criteria to apply is unclear in light of the Supreme Court's insistence in *Arlington Heights v. Metropolitan Housing Development Corp.*[240] on an "impact-plus" standard where a *constitutional* infringement is alleged. The Court was silent as to the test to be applied for statutory violations. Nevertheless, several courts, including the Seventh Circuit on the remand of *Arlington Heights*, have found that the language of the Fair Housing Act (*i.e.*, "because of race") proscribes practices the "natural and foreseeable consequences [of which are] to discriminate between races, regardless of intent."[241] Indeed, virtually identical language appears in Title VII of the Civil Rights Act of 1964,[242] and the Supreme Court has found that a *prima facie* case of Title VII liability requires only a showing of discriminatory effect, not intent.[243] In light of the liberal interpretation given Title VIII,[244] it is most likely that the courts will apply the discrimina-

---

239. For thorough discussions of the racially disproportionate impact test, see Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PENN. L. REV. 540, 553-86 (1977) and Schwemm, *Discriminatory Effect and The Fair Housing Act*, 54 NOTRE DAME LAW. 199, 212-31 (1978).

240. 429 U.S. 252, 264-68 (1977).

241. 558 F.2d 1283, 1288 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978). *See* Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146-49 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); Smith v. Anchor Bldg. Corp., 536 F.2d 231, 233 (8th Cir. 1976). *Accord*, Robinson v. 12 Lofts Realty, 610 F.2d 1032, 1036 (2d Cir. 1979); United States v. Mitchell, 580 F.2d 789, 791 (5th Cir. 1978); United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975). However, the Sixth Circuit rejected an effects test in an exclusionary zoning case similar to *Arlington Heights*. Joseph Skilken & Co. v. City of Toledo, 528 F.2d 867, *vacated & remanded*, 429 U.S. 1068 (1977); 558 F.2d 350 (6th Cir. 1977), *cert. denied*, 434 U.S. 985 (1978). The Fourth Circuit also indicated, in a split decision, that it considers Title VIII to require proof of discriminatory intent. Madison v. Jeffers, 494 F.2d 114 (4th Cir. 1974). The legislative history of the Act is ambiguous as to the proper test. Schwemm, *supra* note 239, at 207-12. For an explanation of the rationale for different standards for constitutional and statutory review, see *id.* at 228-31.

242. 42 U.S.C. § 2000e-2 (1976).

243. In promulgating the "impact-plus" equal protection standard in Washington v. Davis, 426 U.S. 229, 246-48 (1976), Justice White reaffirmed the vitality of the Title VII test enunciated in Griggs v. Duke Power Co., 401 U.S. 424 (1971).

244. Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 147 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); Metropolitan Hous. Development Council v. Village of Arlington Heights, 558 F.2d 1283, 1289 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978). *See generally* notes

tory effect rule. Under this rule, once a *prima facie* case is established, defendant must come forth with a justification for its actions.[245] In light of the questionable nature of many underwriting shortcuts, it may be difficult to justify them even as business necessities.

In 1980, the House of Representatives adopted amendments to the Fair Housing Act (the Edwards-Drinan Bill) which would specifically prohibit insurance redlining under Title VIII.[246] The Senate Judiciary Committee did not include this language in its version of the bill, but adopted an anti-mortgage redlining provision.[247]

The NAIC has voiced four major criticisms of the House bill.[248] First, it fails to distinguish between *fair* and *unfair* discrim-

---

206-11 and accompanying text *supra*. The Seventh Circuit has noted: "As overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find. But this does not mean that racial discrimination has disappeared." 558 F.2d at 1290.

245. Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 148-49 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); Williams v. Matthews, Inc., 499 F.2d 819, 827-28 (8th Cir. 1974). However, the precise nature of the showing required of the defendant to counter the *prima facie* case has differed. *Compare* 564 F.2d at 126 *with* 558 F.2d at 1283 *and* 508 F.2d at 1179. In *Rizzo*, the court examined the racial effects of defendant's practices and then considered their justifications through a procedure similar to that used in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and the Title VII cases. In contrast, the *Arlington Heights* approach involved the "weighing of critical factors." *See generally* Schwemm, *supra* note 239, at 256-61; Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 HARV. C.R.-C.L.L. REV. 128 (1976).

246. Section 6(c) of H.R. 5200, 96th Cong., 2d Sess. (1980), would include the following as an unfair housing practice: "For a person in the business of insuring against hazards to refuse to enter into, or discriminate in the terms, conditions, or privileges of, a contract of insurance against hazards to a dwelling because of the race, color, religion, sex, handicap, or national origin of persons owning, or residing in or near, the dwelling." *See generally* H. REP. No. 96-865, 96th Cong., 2d Sess. 7-8 (1980), which criticized the adequacy of the state anti-redlining enforcement effort and which emphasized that this amendment was merely a reiteration of the case law.

247. Section 5(e) of S.506, 96th Cong., 2d Sess. (1980). Arguably, language in the Senate Report may also prohibit insurance redlining:

> [T]his amendment makes clear that § 805(a) like § 804(a), is "as broad as Congress could have made it", and is intended to eliminate *all practices with the purpose or effect of denying loans* or discriminating in the terms or conditions of loans on account of prohibited bases, or which contribute to or perpetuate a segregated housing market. This is consistent with current interpretation [sic] of the Fair Housing Act.

S. REP. No. 96-919, 96th Cong., 2d Sess. 17 (1980) (footnote deleted) (emphasis added) (citing Laufman v. Oakley Bldg. & Loan Co., 408 F. Supp. 489 (S.D. Ohio 1976) and United States v. American Inst. of Real Estate Appraisers, 422 F. Supp. 1072 (N.D. Ill. 1977)). However, the strength of this argument is undermined by the rejection of an amendment which would specifically prohibit insurance redlining.

248. Crum & Foster Insurance Companies, the American Insurance Association and

ination.[249] Second, the Bill duplicates efforts of state legislatures that have already addressed the problem of unfair discrimination.[250] Third, federal enforcement of anti-redlining measures would inevitably "increase insurance costs and generate a plethora of federal-state jurisdictional conflicts to the detriment of the public interest."[251] Fourth, the bill fails to provide standards that would differentiate racial and ethnic discrimination from income and geographic discrimination.[252]

The NAIC's arguments may be criticized on several grounds. First, the bill itself defines unfair discrimination and uses a social, rather than statistical, conception of fairness. Second, although most states have enacted some form of anti-discrimination law, few are enforcing these laws vigorously enough to prevent insurance redlining.[253] Further, state legislation may lack the broad scope of the Fair Housing Act. Third, although dual regulation necessitates additional costs, federal involvement is not uncommon with respect to the enforcement of civil rights protections, and, given the present track record of state anti-redlining regulation, may be necessary. Finally, geographical discrimination in most cases coincides with ethnic and racial discrimination.[254] Regulations[255] could be promulgated under the Fair Housing Act to bar practices which tend to make insurance unavailable or unaffordable for residents of minority or integrated neighborhoods. These considerations include: location within a metropolitan area, age of property, prior denial of coverage by another insurer or prior coverage by the residual plan.[256] In addition, regulations could prohibit companies

---

the National Association of Independent Insurers submitted statements consistent with the NAIC's approach. *Fair Housing Hearings 1979*, *supra* note 127, at 708, 769-73, 788-89.

249. *Id.* at 756.

250. *Id.* The NAIC also offers its own model approach for states to adopt in controlling redlining. *See* note 127 *supra*.

251. *Fair Housing Hearings 1979*, *supra* note 127, at 757.

252. *Id.*

253. Indeed, HUD has found that "measures such as anti-discrimination statutes and regulations have been proven demonstrably inadequate to halt discrimination, save in cases of the most blatant exercises of racial or ethnic discrimination." INSURANCE CRISIS, *supra* note 8, at 19.

254. *See* notes 189-206 and accompanying text *supra*.

255. The courts have given great weight to administrative interpretations regarding the scope of Title VIII protections. *See* note 229 and accompanying text *supra*.

256. These factors were suggested by MIDWEST CIVIL RIGHTS ADVISORY, *supra* note 3, at 64-66, for consideration by the NAIC as part of its Model Unfair Trade Practices Act. This was rejected by the NAIC in favor of its "business purposes" approach. *See* note 127 and accompanying text *supra*.

from refusing to contract with agents because of the locations of the risks in their books of business.

2. *Indirect Actions.* There are indirect actions which federal executive agencies could take within the parameters of extant legislation and regulations to address the redlining problem. These require the formulation of criteria defining minimum state action that would effectively address the issue. The minimum might include property insurance disclosure laws (requiring disclosure on both the aggregate and individual levels),[257] state legislation barring insurance redlining,[258] and either a federally-approved FAIR plan[259] or alternative means to ensure full insurance availability, such as a municipal insurance corporation.[260] The federal government could mandate these standards as requirements for funding under a number of housing and community development programs. Additional strings might, however, reduce the attractiveness of the grant programs and frustrate their broader goals.

One option is for the Secretary of HUD to determine that a minimum anti-redlining plan must be part of a community's Housing Assistance Plan, a prerequisite for its receipt of community development block grant (CDBG) funds.[261] However, in the case of

---

257. *See* notes 269-85 and accompanying text *infra*.

258. The minimum requirements could be the NAIC Model Act (described in note 127 *supra*) or some stricter standard.

259. This could be set at the present requirements (*see* notes 34-37, 173 and accompanying text *supra*) or the more stringent requirements (*e.g.*, requiring that homeowners' insurance be made available) described in the recommended new approach (*see* notes 385-421 and accompanying text *infra*).

260. Municipal insurance corporations are formed by local governments to carry out an integrated system of fire prevention, suppression and insurance activities. The municipal insurance concept is predicated on the assumption that the elimination of insurance commissions and profits would result in surplus revenues for the municipality that would be used to increase building inspections, install smoke alarms, modernize firefighting equipment and take other safety initiatives deemed appropriate by the community. Such action would reduce fire losses and eventually insurance costs. Funds collected above those necessary to pay claims could be used to reduce insurance premiums or cover all fire suppression activities. Squires, *Community Self-Insurance*, PROGRESSIVE, Dec. 1979, at 48-49; Squires, DeWolfe & DeWolfe, *supra* note 191, at 90-91.

261. A HAP or Housing Assistance Plan, is the mechanism which a community receiving CDBG funds uses to achieve the stated purpose of the [Housing and Community Development Act of 1974] of providing a suitable living environment for low-income persons. The functions of a HAP have been described as follows:

> "[It] is to be completed by the applicant community [and] must contain a survey of the housing stock of a community, an assessment of its housing needs, a goal for the provision of assisted housing, and a description of the location of existing and proposed lower-income housing. The 1974 Act also made the HAP the basis for assistance under many of the federally-subsi-

CDBG entitlement funds for needy communities, it may be unfair to penalize localities by removing this important revenue source due to the state's failure to act. Nor is such an approach promising with respect to the discretionary CDBG program for small cities,[262] as redlining is most prevalent in the larger cities which are ineligible for this program, and the only result may be to discourage the relatively few cities which apply for such grants.[263]

Alternatively, HUD could disqualify all applicants for the competitive and highly sought-after Urban Development Action Grants (UDAGs)[264] who do not have an effective anti-redlining strategy. This would be consistent with present regulations, which require all applicants to show demonstrated results in housing pro-

---

dized, low-income housing programs. As such, it is an important link between the housing and community development sections of the Act. The significance of this cannot be over-estimated. Congress left no doubt of the pivotal role it intended for the HAP by excluding it from the list of application requirements which might be waived by the Secretary."

Angell v. Zinsser, 473 F. Supp. 488, 491 n.5 (D. Conn. 1979) (quoting City of Hartford v. Hills, 408 F. Supp. 889, 898 (D. Conn. 1976)). See 42 U.S.C. § 5304(a)(4) (1976). Regulations provide that:

> The HAP offers applicants a means to implement strategies to conserve and expand its [sic] housing stock in order to provide a decent home in a suitable living environment for all persons, but principally those of lower income. The HAP should facilitate the reduction of the isolation of income groups within communities and geographic areas, affirmatively further fair housing and promote the diversity and vitality of neighborhoods.

24 C.F.R. § 570.306(d) (1980). Present regulations do not require a comprehensive anti-redlining strategy to be part of a HAP, but merely suggest that the strategy to meet housing needs include "actions to eliminate redlining with respect to property insurance and the availability of credit for the purchase and rehabilitation of housing." 24 C.F.R. § 570.304(b)(2)(ii) (1980).

262. 42 U.S.C. § 5306(d)(2), (f)(1) (1976). This approach may be consistent with present regulations since 24 C.F.R. § 570.420(b)(1), (b)(2) (1980) mandate that applicants selected for funding under the Small Cities program will be "those communities having the greatest need as evidenced by poverty and substandard housing and whose applications . . . adequately address locally-determined needs of low- and moderate-income persons" consistent with, *inter alia*, the "support [of] realistic and attainable strategies for expanding low- and moderate-income housing opportunities." The relationship between lower-income housing opportunities and redlining is evident. *See* notes 20-22, 188-93 *supra*.

263. Furthermore, HUD could refuse to fund those CDBG discretionary programs which go directly to states *qua* states, but as the amounts of money under these programs are small the threat of cutting them off is unlikely to induce action. These programs include: Urgent Needs Funds (42 U.S.C. § 5303(b) (1976)); New Communities (42 U.S.C. § 5307(a)(1) (1976)); Areawide Programs (42 U.S.C. § 5307(a)(2) (1976)); Innovative Projects (42 U.S.C. § 5307(a)(4) (1976)); Federally Recognized Disasters (42 U.S.C.A. § 5307(a)(5) (West Supp. 1979)); Inequities Funds (42 U.S.C.A. § 5307(a)(6) (West Supp. 1979)); Reallocated Funds (42 U.S.C. § 5306(e) (1976)).

264. 42 U.S.C. § 5318 (1976).

grams and in the provision of equal housing opportunities to low- and moderate-income persons.[265] The regulations do not require the showing of a Title VIII violation for the withholding of funds; rather, they speak of "demonstrated results." The link between insurance redlining and the denial of minority housing opportunities has been well-documented.[266]

Countervailing factors must be considered. First, the requirement of a comprehensive anti-redlining strategy may penalize UDAG applicants whose applications are otherwise competitive and consistent with the goal of aiding distressed cities. Second, much of the action required is to take place at the state level, where rural and suburban interests may defeat effective action.[267] Thus, it may be unfair to penalize individual cities. The resolution of this conflict requires balancing possible harm to the UDAG program against another urban policy goal: the revitalization of neighborhoods through increasing insurance availability. One way to reconcile these conflicting interests is to make an effective insurance redlining strategy one factor, albeit an important factor, in determining whether a UDAG applicant has achieved "demonstrated results" in housing programs and in attaining equal opportunity therein.[268]

B. LONG-RUN SOLUTIONS

1. Disclosure. In recent years, regulators, legislators and community groups have argued that efforts to improve insurance availability require that insurers disclose to individuals and the

---

265. 24 C.F.R. § 570.452(d), (e)(2) (1980), on authority of 42 U.S.C. § 5318(b) (1976).

266. *See* notes 21, 31 *supra*, for discussion of federal housing policy goals. For the relationship between redlining and housing opportunities see notes 189-98 and accompanying text *supra*.

267. The counter-argument could be made, of course, that this would give rural and suburban interests an incentive to act, which would otherwise not exist.

268. A second and less comprehensive anti-redlining strategy which could be pursued within the UDAG framework would disqualify proposed projects (not applicants) which include the participation, either as lenders or insurers, of companies that redline. This strategy would permit the competition of projects from cities which would have been disqualified had the first UDAG strategy been adopted. At least two problems in this approach are apparent. First, UDAG personnel lack information with which to identify companies that redline. Without some form of official certification from state insurance officials that a company is an egregious redliner, such a determination would be most difficult. Second, even if an insurer were a "state-certified redliner," HUD would be hard-pressed to categorically conclude that the company is involved in urban disinvestment if it is obviously willing to help finance or insure a project to be located in a distressed city.

general public information concerning underwriting decisions.[269] Disclosure may be defined as "the communication of the logic and result of the [c]ompany's business practices to those outside the [c]ompany."[270] There are three types of disclosure: (a) explanations of individual business decisions; (b) explanations of the collective results of business decisions (aggregate disclosure); and (c) explanations of insurance products.

Disclosure on the individual level enables one whose coverage has been declined, cancelled or not renewed to correct or challenge information in the company's or agent's records through either company or governmental channels. Disclosure must be specific if notices of adverse decisions are to be of any use. The letters should also be required to highlight conditions which, if corrected, would make the risk acceptable.[271] The NAIC has recently adopted model state legislation that requires companies to inform individuals of the specific reasons for adverse underwriting decisions and gives individuals the right to see and to correct personal information kept in company files.[272] Yet the GAO study found that in the fall

---

269. The Aetna in-house study noted four categories of data unavailability that "seriously limit[ed] the usefulness" of their research as to whether the company had been redlining:

(1) Data on personal dwelling fire policy writing by ZIP code (in contrast, these data were available for homeowners' policies);

(2) ZIP code data on commercial property policies in force;

(3) Information on the number of refusals made by agents, the reasons given to the applicant, and the manner in which declinations are made;

(4) Data on the relative riskiness of various neighborhoods.

AETNA REPORT, *supra* note 12, at 14-15.

The Aetna study attempted to compensate for these problems by polling a representative sample of all Americans on the availability and demand for insurance. *Id.* at 15-31. The study found that virtually all homeowners (98%) carried property insurance, with 89% carrying a comprehensive policy. *Id.* at 17-19. Of over 1,000 homeowners interviewed, only one indicated that his or her property was not covered due to denial by carriers. *Id.* at 22.

The report concluded from this survey that few availability problems exist. *Id.* at 15, 19, 154. Yet it conceded the fatal flaw of this macro approach: "the results may in fact conceal the magnitude of the problem in selected urban areas." *Id.* at 16. In order to achieve a complete study (and "dispel undue suspicion of the industry"), the report advocated collective disclosure.

270. *Id.* at 154.

271. Aetna has adopted such a policy and recommends that the industry follow suit voluntarily. *Id.* at 155-60.

272. NAIC Insurance Information and Privacy Protection Model Act §§ 8-10 (1979). Section 11 provides an additional important protection: no individual may be asked about a previous adverse underwriting decision without being given an opportunity to provide the reason. "In this way an insurance institution or agent would be less likely to base an adverse underwriting decision on an incomplete item of information with little relevance to current insurability." NAIC Privacy Protection Task Force, A Description and Explanation of the

of 1978, no state required companies to disclose reasons for rejection of applications; twenty-one states did not have any legislation requiring that reasons for non-renewal be specified; and although nearly all states required reasons for cancellation to be specified, twenty-eight only required such at the request of the insured.[273]

Aggregate disclosure is essential if regulators and the general public are to comprehend the magnitude of the problem and devise an appropriate solution.[274] Further, without such disclosure, the effectiveness of judicial and administrative remedies is seriously undermined.

One model for property insurance disclosure legislation is the federal Home Mortgage Disclosure Act of 1975.[275] The Act requires all depository institutions that have offices within a Standard Metropolitan Statistical Area (SMSA)[276] to compile and make available by census tract information about the number and total dollar amount of mortgages and home improvement loans made during the previous fiscal year.[277] However, this form of disclosure is flawed. It gives no information about rejected applications[278] and

---

NAIC Insurance Information & Privacy Protection Model Act 41 (1979). Similarly, § 12 would bar the denial of insurance solely on the basis of a property being previously insured through a FAIR plan.

273. GAO Report, *supra* note 1, at 162. *See also 1980 JLSP Survey*, *supra* note 8.

274. Indeed, the GAO asserts that geographic data collection is "necessary" to address specific allegations of redlining. GAO Report, *supra* note 1, at 148.

275. 12 U.S.C. § 2801-2809 (1976). The applicability of this model is underscored by Aetna's finding that 71% of the American public favor legislation requiring insurance companies to disclose their underwriting activity in a given area. Aetna Report, *supra* note 12, at 162.

276. A standard metropolitan statistical area is a county or contiguous counties containing at least one city or twin cities with a population of at least 50,000. To be included within an SMSA, a contiguous county must be socially and economically integrated with the central city. U.S. Dep't of Commerce, 1970 Census of Housing, vol. I (Housing Characteristics for States, Cities and Counties), app. 3-4 (1972).

277. 12 U.S.C. § 2803(a)(2) (1976).

278. The Act requires that reporting institutions disclose their lending patterns, but the disclosure statements fail to reveal the number of applicants who were denied loans. As one author suggests, "[t]he basic test for redlining must be a comparison between the number of loans requested and number of loans made within each census tract." Note, *An Analysis of the Effectiveness of the Home Mortgage Disclosure Act of 1975*, 28 Case W.L. Rev. 1074, 1111 (1978). Some states enacted disclosure statutes requiring their own licensed lenders to indicate the number of applications as well as the number of mortgage loans made during a given period. *E.g.*, Ill. Rev. Stat. ch. 95, §§ 201-208 (1975) (repealed 1979). *See also* Glen Ellyn Savings & Loan Ass'n v. Tsoumas, 71 Ill. 2d 493, 377 N.E.2d 1, *cert. denied*, 439 U.S. 927 (1978). Michigan requires all credit granting institutions with assets in excess of $10 million to disclose, *inter alia*, by neighborhood, the number of applications denied, reasons for denial and the total dollar amount of mortgages foreclosed. Mich. Comp. Laws Ann. § 445.1601 (Supp. 1980-81). Thus, these state mortgage disclosure acts may provide a

so it cannot be determined whether inactivity in a given area is due to lack of demand or to supply failures. Analogously, absent a method of ascertaining an area's demand for property insurance, it would be difficult to determine whether insurance redlining has actually occurred. All transactions must be monitored if overall disclosure is the goal. Illinois is one of several states which has recently adopted an overall disclosure approach.[279] The Director of Insurance is authorized to order companies to disclose by ZIP code[280] the number of applications received, policies issued, renewals, cancellations and non-renewals for any part of the state.

This form of comprehensive disclosure is opposed by the NAIC Advisory Committee on Insurance Redlining.[281] The Committee believes that any requirements should mandate disclosure only of the total number of policies in effect, and not monitor the number of applications and transactions in a given area.[282] The Committee also urges that data be reported only by rating territory, not by ZIP code, because it says activity within rating territories reflects a company's "actual operations." It argues that ZIP

---

better model for adaptation in the insurance field. For an excellent analysis of the effects of the HMDA in one urban county, see 28 CASE W.L. REV., *supra* at 1074-115.

279. Ins. Code § 143.25, ILL. ANN. STAT. ch. 73, § 755.25 (Smith-Hurd Supp. 1980-81). MINN. STAT. ANN. § 65A.28(1) (West Supp. 1980), mandates that companies file an annual report with the Commissioner itemizing by ZIP code for first-class cities: (a) the number of policies written; (b) the number of policies canceled; (c) the number not renewed; (d) the number of applications for homeowners' insurance declined. The Commissioner is also empowered to require information to be reported from other areas of the state and to request additional information (e.g., premium and claims data) from any area. New York and Georgia require aggregate disclosure through regulations. The Georgia regulations require only disclosure of the number of cancellations, non-renewals and policies in force. Rules & Regs. of Ga. Ins. Dep't 120-2-15-.04 (amended Feb. 8, 1979); Memorandum to All Insurers Transacting Casualty & Property Insurance in the State of Georgia, from Frank Parker, Deputy Insurance Commissioner (July 18, 1979). The New York regulation is similar to the Illinois law, except the Commissioner has no discretion to exempt areas of the state from the disclosure requirement. Further, excluded from the totals are cancellations for non-payment of premium. 11 N.Y. CODE RULES & REG. § 218.7 (1980). MO. ANN. STAT. § 374.405 (Vernon Supp. 1979) also authorizes the Director of Insurance to require aggregate disclosure of underwriting activity.

280. Activists argue that ZIP code is the level at which redlining operates. *See* notes 68-69 and accompanying text *supra*. The Aetna Taskforce also suggests that ZIP code data collection would be administratively convenient for the industry, as it currently accumulates ZIP code information and can organize data on that basis. The Taskforce recognizes, however, that census tract analysis has several advantages, since much demographic information is accumulated on that basis. AETNA REPORT, *supra* note 12, at 164.

281. NAIC 90 Day Report, *supra* note 16, at 44-49 & app. H. However, the industry may not be unanimous on this point—e.g., the Aetna Taskforce supports disclosure if the specific requirements are not unduly burdensome. *See* note 269 *supra*.

282. *Id.* at 46-47 & app. H.

code disclosure requirements would obfuscate rather than inform and would encourage the evolution of widespread ZIP code rating.[283] Finally, the Committee contends that the costs of accumulating data on areas as small as ZIP code areas would be prohibitive.[284]

One problem with the Advisory Committee's contention is that if disclosure were limited to policies in force, regulators would not be able to review marketing strategies and find emerging troublespots. Further, although ZIP codes are heterogenous areas, marketing statistics are more meaningful on this level than they are for the larger rating territories. This is underlined by rating manuals, testimony of agents, and empirical data, all indicating that ZIP code underwriting is a reality.[285] The trade-off implicit between usable data and cost necessitates a policy decision. Although implementation of the disclosure system would entail some start-up costs, economies would be realized once companies computerize policy information by ZIP code.[286]

Other proposals for more extensive aggregate disclosure are even more controversial. Diverse groups, ranging from the Aetna Task Force[287] to the GAO,[288] support the compilation of loss data[289] in order to determine whether the reluctance to write policies in a given area is correlated with risk of loss. Although such information would be helpful, the data may be misused in an attempt to justify redlining.

Another type of disclosure, required in New York,[290] is annual compilations of the location of agents by ZIP code and of areas where agent terminations have occured. Data on agent locations

---

283. *Id.* at 46.

284. *Id.* at app. H. In general, the Technical Subcommittee on Statistics of the NAIC Redlining Taskforce supports this assessment. Because there are often 60 ZIP codes for each rating territory, ZIP code accumulation would multiply the data to be processed and handling time by a factor of 60. In areas where redlining problems are perceived to be severe, the NAIC does not oppose disclosure on this level. *Fair Housing Hearings: 1978*, *supra* note 76, at 606-07, (statement of the NAIC).

285. *See, e.g., Citizens & Shareholders 1978 Report*, *supra* note 72, at 5-6; G. Squires & R. DeWolfe, Disclosure: The Time Has Come, *reprinted in* NAIC 90 Day Report, *supra* note 16, at 53.

286. *See* note 285 *supra*.

287. AETNA REPORT, *supra* note 12, at 163-64.

288. GAO REPORT, *supra* note 1, at 148.

289. Authorization for this form of disclosure is found in Ins. Code § 143.25, ILL. ANN. STAT. ch. 73, § 755.25 (Smith-Hurd Supp. 1980-81).

290. 11 N.Y. CODE OF RULES & REG. § 218.7(a),(d) (1980). *See also id.* § 218.4 (1979) (requiring specific reasons to be stated for termination of brokers).

are also accessible to the state insurance departments from their records of agent licenses. The NAIC, however, points out several problems with this source of information:

> First, the address [sic] of agents on file with the state Insurance Departments are generally their home addresses, The location of the home has little bearing on where they write. Second, even if you can establish that a given agent has a business location within a given area, it doesn't necessarily follow that he writes insurance in this area. The same can be said of the lack of agents in a certain area. Even if they are physically located elsewhere, the agents may still be writing in certain ZIP codes.[291]

Nevertheless, accessibility may increase availability. If an agent knows a neighborhood, he or she may be more willing to examine risks on a case-by-case basis. Furtner, inner-city residents' familiarity with agents may lead to a greater number of applications in the voluntary market. Therefore, agent location is useful as *one* indicator of potential voluntary market activity in a given area.[292]

The third type of disclosure, explanations of insurance products, enjoys universal support. It involves greater dissemination of information and affirmative marketing of industry products in urban core areas—these may be called "keep-out" and "take-out" programs.[293] These measures include: the establishment of voluntary registers containing the names of persons encountering difficulties in obtaining voluntary market insurance for agents to inspect; outreach campaigns to market special insurance programs for "mature neighborhoods"; consumer information centers; and greater publicity about FAIR availability.[294] Efforts to depopulate the FAIR pool could include mailings and media campaigns to FAIR customers and notices in adverse decision letters to advise consumers that FAIR is not the only option.[295] Information and affirmative marketing strategies are important complements to a comprehensive insurance availability program, but they are not substitutes for it. It is of little use in encouraging FAIR insureds to submit voluntary market applications, if agents reject them auto-

---

291. *Fair Housing Hearings: 1978*, *supra* note 76, at 606.

292. For further discussion of this controversy, see notes 70, 90-91 and accompanying text *supra*.

293. These programs are designed to "keep out" and "take out" risks from the FAIR plans. AETNA REPORT, *supra* note 12, at 147.

294. NAIC 90 Day Report, *supra* note 16, at 44, 61-63, & apps. E and F.

295. AETNA REPORT, *supra* note 12, at 147.

matically. Also, insurers will voluntarily select insureds from the registers only to the extent that they can sell to those who can pay the right price. Therefore, improvements achieved through these methods may only be marginal. Indeed, cynics may argue that any improvements would stem from political considerations; companies may be willing to absorb part of the register at the cost of smaller profits if by doing so they can minimize governmental intervention or stave off FAIR and its concomitant additional costs.[296]

2. *Regulation v. Deregulation.* A Justice Department study of the McCarran-Ferguson Act found that rigid state regulation stifled competition, created unreasonable rates and aggravated unavailability problems.[297] It further argued that the removal of the McCarran-Ferguson anti-trust exemption would not imperil industry profitability nor prohibit reasonable industry information-sharing practices, such as the pooling of loss experience data.[298]

The report called for an expanded federal regulatory role, through a process similar to that present in the dually-regulated banking system.[299] Insurance companies could choose a federal charter and relinquish the antitrust exemption, or retain the exemption under state charter. Federally-chartered companies would not be subject to state regulation of rates, merchandising, guaranty funds and solvency requirements.[300] Instead, these companies would participate in a federal guaranty system, which would serve both monitoring and guaranty fund functions.[301] As a whole, the regulatory scheme would be looser. Nevertheless, invidious discrimination based on race, age and sex of insureds in the selection and classification of risks would be prohibited.[302] The rate struc-

---

296. *E.g.*, in some non-FAIR states, insurance companies are quick to remind state legislators that they have been picking up clients from the register systematically. The industry may be using the register as a public relations weapon to fight FAIR and its potential spread-back of losses to member companies. In addition, non-FAIR state insurance commissioners have occasionally prodded companies into establishing registers under the threat that if nothing were done, FAIR would be instituted. *See id.* at app. F.

297. U.S. DEP'T OF JUSTICE, *supra* note 162, at vi-vii, 340-43, *reprinted in Antitrust Exemptions*, *supra* note 162, at 110-11, 456-59.

298. *Id.* at vi-viii, *reprinted in Antitrust Exemptions*, *supra* note 162, at 110-12.

299. *Id.* at viii-xii, 355-59, *reprinted in Antitrust Exemptions*, *supra* note 162, at 112-16, 471-75.

300. *Id.* at 359-64, *reprinted in Antitrust Exemptions*, *supra* note 162, at 475-80.

301. *Id.* at ix, 353-55, 362-64, *reprinted in Antitrust Exemptions*, *supra* note 162, at 113, 469-71, 478-80. The guaranty fund is analogous to the Federal Deposit Insurance Corporation.

302. *Id.* at ix-x, 347, 366, *reprinted in Antitrust Exemptions*, *supra* note 162, at 113-14, 463, 482. Disclosure would also include alternative sources and prices of insurance.

ture would be determined by open competition, and disclosure laws would be promulgated.[303] States would be permitted to tax companies, license agents and regulate systems of liability.[304] Insurance companies opting for state charters would be subject to all state insurance regulations.[305]

The Justice Department's proposal proceeds from the premise that "[c]ompetitive forces can generally serve to protect consumers against unfairly discriminatory prices provided there is adequate disclosure and regulatory effort to make consumers aware of alternative sources and prices of insurance."[306] The Department relies upon market competition to determine optimal rates, classification and territorial plans, and underwriting procedures. Deregulation is also supported by the industry as essential to solving the unavailability problem: with flexibility in rates and less stringent solvency requirements, companies would be better able to write higher risk policies.[307]

The Department concedes the primary weakness of its plan, stating that reliance on competition might not rectify problems of social fairness,[308] particularly regarding invidious discrimination and the unaffordability problem. To help counteract discrimination, the Department advocates that federally-chartered companies be prohibited from refusing to service individuals or charging them higher rates because of their race, age or sex.[309] Further, the report notes that states may provide external direct subsidies to higher-risk insureds so that they can afford higher-cost policies.[310] It also suggests that "some form of mandatory pooling mechanism may be necessary" to cover all insurable risks.[311] The pool would be state-regulated, and federally-chartered companies would only be re-

303. *Id.* at 361-62, 365, *reprinted in Antitrust Exemptions*, *supra* note 162, at 477-78, 481.

304. *Id.* at x-xi, 347, 366-69, *reprinted in Antitrust Exemptions*, *supra* note 162, at 114-15, 463, 482-85.

305. *Id.* at xi, *reprinted in Antitrust Exemptions*, *supra* note 162, at 115.

306. *Id.* at 346, *reprinted in Antitrust Exemptions*, *supra* note 162, at 462.

307. *See, e.g.*, STATE FARM INS. CO., *supra* note 59, at 1-2. This represents a major shift from the industry's classical position of seeking protection through standard rates. Johnson, *supra* note 96, at 33-34.

308. U.S. DEP'T OF JUSTICE, *supra* note 162, at 366, *reprinted in Antitrust Exemptions*, *supra* note 162, at 482.

309. *Id.* at 337-39, 366, *reprinted in Antitrust Exemptions*, *supra* note 162, at 453-55, 482.

310. *Id.* at 347, *reprinted in Antitrust Exemptions*, *supra* note 162, at 463. The industry also favors this form of subsidization. *See* note 333 and accompanying text *infra*.

311. *Id.* at 367, *reprinted in Antitrust Exemptions*, *supra* note 162, at 483.

quired to participate in plans which were financially self-sustaining.[312] Otherwise, states could use federally-chartered companies to cross-subsidize their own regulated markets.

It is true that from a viewpoint of economic theory, open market competition would guarantee efficiency in the provision of insurance services for the greatest possible number of risks at the lowest possible prices. Many consigned to the residual pool would be able to re-enter the voluntary market. Nevertheless, several problems would remain. Although the Justice Department proposal would penalize companies engaging in invidious discrimination, it offers no prohibitions against activities within the broader definition of redlining (*e.g.*, varying availability because of the age of a structure). In addition, deregulation would not aid those risks subjectively perceived by the industry to be higher-risk and thus forced to pay higher rates. Finally, for political reasons, Justice's reliance on state external subsidies to these insureds appears to be highly unrealistic. Thus, deregulation would accelerate "rating-out" and aggravate the redlining problem.

3. Full Availability Plans. In contrast to the free market emphasis of the Justice Department report, the FIA's *Full Insurance Availability* proposal[313] and Michigan's Essential Insurance Plan[314] offer comprehensive regulatory strategies that seek to guarantee coverage for all insurable risks. The FIA plan is based on voluntary adoption by the states—it contemplates no federal subsidy, regulation or interference with state regulatory schemes.[315] The Michigan Plan was inspired by the FIA report and adopted by the state legislature in 1979.

Both plans require all insurance companies doing business within the state[316] to offer homeowners' insurance to risks which meet the objective criteria of their classification plans.[317] The

---

312. *Id.* at 368, *reprinted in Antitrust Exemptions*, *supra* note 162, at 484.

313. FULL INSURANCE AVAILABILITY, *supra* note 23, at 73-92.

314. 1979 Mich. Pub. Act No. 145; MICH. COMP. LAWS ANN. §§ 500.2101-500.2131 (Supp. 1980-81). *See* MICHIGAN ESSENTIAL INSURANCE, *supra* note 158, *reprinted in Rights & Remedies*, *supra* note 53, at 553-623.

315. FULL INSURANCE AVAILABILITY, *supra* note 23, at 91-92.

316. Under the Michigan Plan, companies whose surplus was less than $4 million on December 31, 1979, were permitted to file an exemption by January 1, 1981. The exemption is to be permanent unless there is substantial growth in premium volume or it appears that the company is using its exemption to take advantage of its resulting competitive advantage. MICH. COMP LAWS ANN. § 500.2129 (Supp. 1980-81).

317. FULL INSURANCE AVAILABILITY, *supra* note 23, at 73. MICH. COMP. LAWS ANN. §§ 500.2117(1), 2119 (Supp. 1980-81). The FIA Plan contemplates extension to all lines of in-

Michigan law, however, limits its mandate to applicants who are either the owner-occupants or tenants of structures with one to four residential units.[318] Furthermore, it excludes, *inter alia*, extremely low value properties;[319] properties used for illegal or hazardous purposes; properties owned by persons recently convicted of arson, or denied major insurance claims due to arson, misrepresentation or fraud; properties two years in arrears on real estate taxes; and properties not meeting minimum standards of insurability established by the Commissioner through regulations.[320]

Under either plan, rate differentials could persist among companies because of open market competition.[321] State regulators would, however, be empowered to review company rating territories and classifications. Companies would be expected to justify such classifications with objective data.[322] Michigan does not permit more than three different territorial base rates for home insurance coverage.[323] Finally, the Michigan plan places a premium on disclosure: companies must disclose to policyholders annually the

---

surance written by the company. The Michigan Plan contemplates coverage substantially equivalent to the HO-2 form replacement policy. *Id.* § 500.2117(3). For a description of HO-2 form coverage, see note 35 *supra*.

318. *Id.* § 500.2103(2).

319. It sets a minimum insured value of $7,500 for a repair cost policy and $15,000 for a replacement cost policy.

320. MICH. COMP. LAWS ANN. § 500.2103(2) (Supp. 1980-81). A company is also entitled to refuse coverage if an applicant refuses to purchase coverage for at least 80% of replacement cost under a replacement cost policy, 100% of market value under a repair cost policy, or 100% of actual cash value under a tenant's or renter's home insurance policy. Companies are circumscribed in establishing any other underwriting rules. They can have rules prohibiting coverage if a structure is in bad physical condition (if the condition increases the risk of loss and if the age of the structure is not considered—substantial compliance with local housing law creates a rebutable presumption of meeting the insurer's underwriting rules); or is vacant; or if the policyholder has a history of negligence or a bad claim record. *Id.* § 500.2117(2). An insurer may only reject an application because market value is lower than replacement cost if it makes available a repair cost policy substantially equivalent to HO-2 form replacement cost policy. *Id.* § 500.2117(2)(e), (3).

321. FULL INSURANCE AVAILABILITY, *supra* note 23, at 90-91. For discussion of open competition, see note 162 *supra*.

322. FULL INSURANCE AVAILABILITY, *supra* note 23 at 89-90. *See* MICH. COMP. LAWS ANN. §§ 500.2108-500.2110 (Supp. 1980-81). Furthermore, under the Michigan statute, classifications are limited to the following factors: amount and types of coverage; security and safety devices; repairable structural defects related to risk; the quality of police and fire protection; building components and size of structure; loss experience of the insured, based on prior claims *attributable to factors under his or her control*. *Id.* § 500.2111(12).

323. MICH. COMP. LAWS ANN. § 500.2111(13)(a) (Supp. 1980-81). Furthermore, the lowest territorial base rate for owner-occupied buildings cannot be less than 70% of the highest. *Id.* § 500.2111(13)(b).

nature of their classification plans and underwriting rules.[324] Individuals who believe that coverage has been improperly denied or that an insurer has charged an incorrect premium are guaranteed both an informal managerial-level conference with the insurer and a review before the Insurance Commissioner.[325]

Full availability requires an adequate number of marketing facilities where consumers could purchase insurance. If more outlets are needed, both the FIA and Michigan plans empower state officials to undertake administrative action to guarantee them.[326] Further, the plans forbid companies from penalizing agents and brokers because of the perceived risks of their business and prohibit the termination of agents without cause.[327]

The insurance industry has opposed the concept of "full availability." Companies dispute the proposition that every insurable risk has a "right" to buy insurance from the company of his or her choice.[328] The industry argues that its risk selection process is not capricious and does not lead to arbitrary abandonment of large segments of the market.[329] Companies also contend that competitive market determinations of overall rates and territorial and classification plans would solve the problems of insurance unavailability.[330] They argue that requiring them to take all comers would increase the number of bad risks and thus force prices up for all. It would also impinge upon the managerial prerogative to set corpo-

---

324. *Id.* §§ 500.2112, 500.2122.

325. *Id.* § 500.2113. The absence of such a grievance mechanism in the FIA plan is a glaring defect.

326. *Id.* § 500.2128. FULL INSURANCE AVAILABILITY, *supra* note 23, at 77-78. The effects of such administrative actions differ markedly. Under the Michigan proposal, FAIR plan offices are established. The FIA plan contemplates requiring additional offices of private insurers, with special arrangements to mitigate additional operating costs.

327. FULL INSURANCE AVAILABILITY, *supra* note 23, at 76. MICH. COMP. LAWS ANN. § 500.1209(3) (Supp. 1980-81), restricts the termination of agents to the following reasons: (a) malfeasance; (b) breach of fiduciary duty or trust; (c) violation of the Act; (d) failure to perform as provided by the contract between the parties; (e) submission of less than twenty-five applications during the prior year. Section 500.1209(1) requires 90-days written notice and full disclosure to both the Commissioner and the agent of the reasons for termination. Explicitly prohibited in § 500.1209(4) are terminations based on the geographic location of the agent's business and his or her expected or actual loss record (related to location). Finally, as an added protection, the law provides: "An insurer shall not cancel or refuse to renew the policy of an insured because of the termination of an agent's contract." *Id.* § 500.1209(2).

328. STATE FARM INS. CO., *supra* note 59, at 5-6.

329. *Id.* at 6-8.

330. *Id.* at 2, 4, 31. "[T]he residual market is not necessarily composed of risks which are 'bad,' but rather of risks which are perceived to be underpriced." *Id.* at 4.

rate goals and identify markets it wishes to serve.[331] Companies argue that if some subsidy is needed to assure availability, it should come from an external source either in the form of direct governmental subsidies to substandard insurables or identifiable premium surcharges appearing on all insurance bills.[332]

In essence, the legislature faces a policy choice. There is sufficient documentation of good risks left uninsured or confronted with exorbitant prices to support a finding of capriciousness in the marketplace. The unaffordability of insurance may defeat other urban policy goals. The creation of a property right to buy insurance in the voluntary market may be one solution to the redlining problem. In contrast to automobile insurance, where easier availability may lead to more accidents by lowering the cost of driving for higher-risk persons, the unaffordability of homeowners' insurance threatens deterioration and creates a psychological climate of disinvestment. With respect to the cost of home insurance, the issue is the allocation of risk, and the legislature may determine that social policy dictates the spreading of that risk from one inner-city property owner to a larger group. Whether the redistribution occurs directly, as a discrete surcharge on insurance bills or a subsidy to high-risk insureds, or indirectly, with companies as conduits, may depend on numerous policy and political considerations.

Although neither the FIA nor the Michigan plan requires companies to accept "uninsurable risks,"[333] difficulties attend any full availability plan. Companies that have traditionally served inner-city areas may be deluged with new higher-risk applicants, diminishing their profitability. This may deter other companies from entering the urban market. Companies that completed their withdrawal from the urban core years ago would remain unscathed. On the other hand, it would be unfair and inefficient to require rural insurers to write policies in unfamiliar cities in the name of equalization.

The Michigan and the FIA plans diverge in their approaches to the problem of a company being overwhelmed by new applications. Under the Michigan plan, a company may be relieved of its obligation to accept all insurable risks by filing a statement with the Insurance Commissioner suspending its acceptance of any new

---

331. *Id.* at 16-17.

332. *Id.* at 26-27.

333. FULL INSURANCE AVAILABILITY, *supra* note 23, at 75; MICH. COMP. LAWS ANN. §§ 500.2103(2)(j), 500.2117 (Supp. 1980-81).

applications.[334] Alternatively, after a hearing, the Commissioner may suspend an insurer's duty to write all insurable risks if he or she determines that it is in "the best interests of the public, the insurer and [its] policyholders" or that the requirement causes the insurer undue financial or administrative hardship.[335] Furthermore, the Michigan FAIR Plan is retained—it will cover insurable risks that do not meet the minimum eligibility requirements for the full availability plan[336] and those experiencing difficulty in obtaining coverage or otherwise choosing to forego the voluntary market.[337] Rates charged by FAIR in each territory for home insurance are to be set at the weighted average of those used by the ten largest voluntary market insurer groups in the state.[338]

Although the Michigan legislation alleviates many of the difficulties faced by FAIR insureds, its disproportionate impact on those companies that continue to do substantial business in urban areas raises questions as to its fairness. Widespread use of the plan's safety valves—the suspension of an insurer's duty or its ability to write policies at all—would defeat the effectiveness of its innovative approach.

The FIA recommends a different form of safety valve: the creation of state reinsurance exchanges that would assume all or part of a company's insurable risks not carried on its books.[339] Risks

---

334. MICH. COMP. LAWS ANN. § 500.2126 (Supp. 1980-81). The Commissioner may disapprove the suspension if he or she finds that it does not have a legitimate business purpose or that the suspension would "adversely affect the maintenance of a competitive market." The latter provision may effectively lock-in all of the major companies.

335. *Id.* § 500.2125. According to Barbara Edwards, Michigan Insurance Bureau, this remedy will only be used in the most extreme cases (telephone interview, Feb. 14, 1980).

336. Properties in this category include those above four units or owned by absentee landlords; those below the minimum insurance values; and those whose owners have bad loss records, histories of negligence or are in real estate tax arrearage. *Compare* MICH. COMP. LAWS ANN. § 500.2901(f) (Supp. 1980-81) *with id.* § 500.2103(2) *and* § 500.2117. Those properties with more than four units or owned by absentee landlords may obtain "basic property insurance" defined as fire, extended coverage, vandalism, malicious mischief and theft coverage. *Id.* § 500.2901(a). The other properties are entitled to broader "home insurance," substantially equivalent to the HO-2 form replacement cost policy. *Id.* § 500.2930a(4).

337. *Id.* § 500.2925.

338. *Id.* § 500.2930a(1). Rating territories for FAIR are based on voluntary market territories. Properties eligible for "basic property insurance" (*see* note 336 *supra*) are to be charged the rate for the identical insurance established by the principal rating organization in the state plus a uniform surcharge approved by the Commissioner. *Id.* § 500.2930(1).

339. FULL INSURANCE AVAILABILITY, *supra* note 23, at 78. Presumably, these would be insurable risks that produce an inordinate amount of losses. Under the plan, when risks are ceded, *all* coverages are ceded, not only the portion of coverage which presents an abnor-

ceded to the exchange would continue to be serviced by their original insurer and would not be considered a separate book of business.[340] Companies would be charged a fair cost for ceding risks.[341]

In the likely event that reinsurance premiums are not equal to exchange losses, the state exchange would reimburse or assess ceding companies for the difference. The assessment formula would take into account both an insurer's statewide share of a particular line and its share of total cessions to the exchange. Relative market shares would be five-year averages. Thus, those insurers experiencing progressive market growth over the period would be rewarded, while those experiencing a decline would not be able to obtain immediate benefits from their reductions in business.[342] Moreover, an insurer both decreasing its participation in the overall market and increasing its percentage of aggregate cessions to the reinsurance exchange would be doubly penalized when losses are distributed to member companies.[343] The ratio recommended by the FIA is:

$$\frac{\text{5-Yr. Co. Retained Premiums Written} \div \text{5 Times Latest Yr. Co. Ceded Premiums}}{\text{5-Yr. Industry Retained Premiums Written} \div \text{5 Times Latest Yr. Industry Ceded Premiums}}$$

As an additional deterrent to over-utilization of the exchange, the FIA proposes that state insurance departments investigate companies that show an unusually high ratio of policies ceded to policies retained, to determine whether their practices stem from inadequacies in their rate structures.

All claims for losses would be settled by the insurer using ordinary business practices. The pure loss that it pays to the insured would constitute a paper balance owed to the company by the exchange to be offset at the end of the accounting period by any sum owed the exchange. The exchange itself would function mechani-

---

mally high loss potential (e.g., fire insurance for an apartment above a pizzeria cannot be ceded without also ceding malicious mischief coverage). Ceding would occur at regular intervals.

340. *Id.*

341. The Administration determined that the fairest cost is payment by the insurer to the exchange of the balance remaining of the premium that the company charged the insured, after deducting the expense and loss adjustment portions. The cession cost is therefore the portion of each dollar allocated by the ceding insurer in its rate-making structure to pure premium, profit and contingencies. *Id.* at 13.

342. This principle is demonstrated in the Appendix by calculation of the FIA assessment formula in each hypothetical.

343. *Id.* at 86.

cally—its transactions would be inter-company in nature and would require minimal staffing. It would not be authorized to set rates.

The industry opposes the reinsurance exchange concept on several grounds, the most significant being that the assumption of bad risks would increase rates for the vast majority of clean risk homeowners.[344] It also argues that the requirement of participation would be an unconstitutional taking without due process of law.[345] Finally, it contends that the reinsurance exchange would be an accounting nightmare.[346]

With respect to the industry's first argument, one may argue that it is socially desirable to spread the costs of cross-subsidization across a larger segment of the population. In addition, an analogy may be drawn to the industry's predictions in 1968 that mandatory FAIR plans meant financial ruin; nevertheless, firm profitability has been higher in FAIR than in non-FAIR states.[347] With respect to the confiscation argument, the distribution of the deficit through the exchange seems indistinguishable from current FAIR practices, which typically require private firms to absorb deficits, and from assigned risk pools for automobile insurance.[348] Requirements to take all *insurable* risks are no more confiscatory than other requirements in the insurance law proscribing consider-

---

344. State Farm Ins. Co., *supra* note 59, at 5.

345. *Id.* at 13-15 (citing Hartford Accident & Indemnity v. Ingram, 280 N.C. 457, 467-71, 226 S.E.2d 498, 505-07 (1976)), which invalidated a statute requiring all general liability insurers to participate in a state-run medical insurance pool and exchange as a condition of doing business in the state.

346. State Farm Ins. Co., *supra* note 59, at 18.

347. Insurance Crisis, *supra* note 8, at 26.

348. Indeed, the Supreme Court of California in State Automobile Ass'n Inter Ins. Bureau v. Maloney, 341 U.S. 105, 108-11 (1951), denied a challenge to a statute requiring participation in a state residual automobile insurance pool despite plaintiff's objections that the statute unconstitutionally forced it to expand from a limited basis insurer to an insurer of the public at large. In Insurer's Action Council, Inc. v. Heaton, 423 F. Supp. 921, 923-25 (D. Minn. 1976), the court observed that *Hartford* was based on a combination of confiscation and conscription. The district court dismissed the allegation of confiscation in *Heaton*, noting that under the modern due process doctrine, courts do not substitute their economic and social judgments for those of legislatures. *Id.* at 924 (citing Ferguson v. Skrupa, 372 U.S. 726 (1963)). Conscription is present only where legislation impermissibly requires a company to enter a *new* line of business. 423 F. Supp. at 925. Conscription is clearly not a problem here. *Accord*, Health Ins. Ass'n of Am. v. Harnett, 89 Misc. 2d 795, 800-01, 395 N.Y.S.2d 372, 375-76 (Sup. Ct.), *aff'd*, 59 App. Div. 2d 679, 398 N.Y.S.2d 851 (1977), *aff'd*, 44 N.Y.2d 302, 312, 376 N.E.2d 1280, 1286, 405 N.Y.S.2d 634, 640 (1978). *See* Sheeran v. Nationwide Mutual Ins. Co., 80 N.J. 548, 559-60, 404 A.2d 625, 630-31 (1979) (guaranteed automobile insurance renewal law is not a deprivation).

ation of various suspect criteria.[349] With respect to the third argument, reinsurance is not a revolutionary concept in the industry, and it is difficult to understand why this reform would necessitate a greatly expanded accounting system.

Nevertheless, the FIA plan is not a cure-all for insurance redlining. Perhaps its greatest defect is its reliance on state legislative action. In general, activity on this level has been mixed.[350] In the six years since *Full Insurance Availability* was issued, only four states have developed reinsurance exchanges[351] and none has adopted the comprehensive plan that the Administration recommends. This attests to the tremendous power of the insurance lobby in the state legislatures, which makes it unlikely that states will enact this comprehensive remedy.

In addition, the FIA's formula for spreading back losses to member companies deters them from accepting current FAIR insureds. A company accepting these risks increases its share of the state market and therefore its share of redistributed exchange losses. Thus, the formula provides an additional incentive for the company to affirmatively market among only the perceived best risks. The plan provides no mechanism for the inspection of ceded risks to ascertain whether they are truly insurable. Finally, the FIA plan does not safeguard against differential treatment of ceded and retained risks. Once ceded to the exchange, risks may be accorded inferior service.

4. Insurance Competition Improvement Act. Senator Howard Metzenbaum has introduced the Insurance Competition Improvement Act (ICIA),[352] a bill which would effectuate a *federal* full insurance availability plan.[353] The bill's purpose "is to ensure that State regulation meets basic standards of fairness and competitive rating, not to impose Federal regulation on the insurance industry."[354]

Section 4 of the ICIA spells out the federal standards to be

---

349. *See* notes 122-57 *supra*.

350. Indeed, while advocating this approach, then-Acting Administrator Hunter conceded that state regulation is less effective than it could be. *Rights & Remedies*, *supra* note 53, at 219. *See* notes 58-72 and accompanying text *supra*.

351. North Carolina, South Carolina, Massachusetts and New Hampshire. *See id.* at 215.

352. S. 2474, 96th Cong., 2d Sess., 126 CONG. REC. S2977 (1980).

353. *Id.* § 6. Section 2 would limit the sweeping anti-trust immunity of the McCarran-Ferguson Act.

354. 126 CONG. REC. S2980 (1980).

implemented by the states. The bill mandates that unless a risk is objectively uninsurable,[355] insurers cannot refuse, cancel or fail to renew coverage which they generally provide. Exceptions would be made where the decision is based on the applicant's nonpayment of premium, fraud or material misrepresentation.[356] In order that these standards may be enforced, insurers are required to provide specific reasons for adverse underwriting decisions.[357] The consumer may, upon receipt of this notification, request review from an appropriate state official.[358] The company will be required to cover the risk unless state regulators find that it has exhausted its capital capacity.[359]

The bill allows insurers to continue designing rating territories and classifications, subject to the determination of the commissioner that the classifications are "fair, just, reasonable, and not unfairly discriminatory."[360] In determining whether the classifications meet these standards, the commissioner is instructed to give substantial weight to: (1) the degree to which the defining characteristic is linked to the likelihood of loss and controllable by individual insureds; (2) the accuracy of pricing for each individual so grouped; (3) the incentive provided for the reduction of losses by the insured; and (4) the proposed classification's "compatibility . . . with widely held social values."[361] The commissioner will also determine whether the proposed rate differentials accurately rate *individuals*, avoid large surcharges, and broadly distribute environmental hazards. The differentials must also meet the traditional standards of reasonableness and the avoidance of unfair discrimination.[362] A maximum ratio of 1.5 to 1 is set for the difference between the highest and lowest rate in a state for two insureds similarly situated in all respects except geography. The same maximum ratio is set for differences based on all other group classifica-

355. "Insurable risk" is defined in S. 2474, § 565(4) as
any risk other than a risk that creates a potential for loss so great in relation to a normal premium for a risk similarly classified, on the basis of characteristics particular to that risk determined on an individual nonaggregated basis, that no prudent insurer would voluntarily underwrite it.

356. *Id.* § 6(b)(1)(A), (B).

357. *Id.* § 6(b)(2), (3), (4).

358. *Id.* § 6(b)(4).

359. *Id.* § 6(b)(1)(E).

360. *Id.* § 6(c)(1).

361. *Id.* § 6(c)(2).

362. *Id.* § 6(d)(1), (2).

tions.[363] As an added protection against availability problems stemming from this rate regulation, no person may be charged a higher rate or receive less coverage solely because he or she is insured through a residual market mechanism.[364] Agent compensation is also to mirror that of the voluntary market.[365]

To ensure fairness, companies are required to file with the commissioner manuals of rules and rates, rating plans, classification manuals and underwriting guidelines.[366] Each guideline or classification must be accompanied by full supporting documentation.[367] In addition, insurers are required to show a breakdown by rating territory of their new and renewal business, cancellations, non-renewals and applications.[368]

The bill also effectuates reform in the pricing of insurance. It implements a system of open price competition on statewide average rates for property insurance[369] and prohibits state insurance commissioners from questioning aggregate rates as excessive.[370] The ICIA, however, allows a state to reenact prior approval of base rates or grant authority to a commissioner to exercise rate regulatory control if he or she determines competition to be insufficient to assure that rates will not be excessive or if industry behavior is potentially destructive of competition.[371] To prevent administrative action that would defeat the purposes of the Act, neither of these powers may be exercised during the eighteen month period following the enactment of this section.[372]

To enhance price competition, the bill seeks to increase public information by requiring commissioners to prepare annual consumer shopping guides summarizing the scope of coverage and prices offered by each company.[373] Insurers and agents are also required to provide specific price information on request.[374] Finally, minimum "policy readibility" standards are set.[375]

---

363. *Id.* § 6(d)(5).
364. *Id.* § 6(d)(6).
365. *Id.* § 10(c).
366. *Id.* § 11.
367. *Id.*
368. *Id.*
369. *Id.* § 8(a).
370. *Id.*
371. *Id.* § 8(b)(1), (2).
372. *Id.*
373. *Id.* § 9(a).
374. *Id.* § 9(b).
375. *Id.* § 7.

The bill's sponsors recognize that its provisions could easily be subverted in the absence of safeguards on agent terminations. Termination is therefore forbidden on the basis of the geographic location or loss experience of the agent's business.[376] Written notice with supporting evidence at least ninety days prior to termination is required, and an opportunity for review by the commissioner is established.[377]

The bill seeks to minimize federal involvement in the administration of these standards,[378] and relies primarily for enforcement upon private rights of action in state and federal courts, with treble damages awarded to successful plaintiffs.[379] Enforcement authority is also vested in the state insurance commissioner and attorney general.[380] No action for any violation of an ICIA standard may be brought in federal court in any state which has enacted that provision into law.[381]

The ICIA is an innovative proposal that seeks to avoid the fundamental defect of the FIA plan: reliance on state action. Further, it explicitly defines for insurance commissioners those factors to be considered in reviewing rating territories and classifications, and sets objective standards in establishing maximum rate differentials. Finally, the ICIA places a premium on all forms of disclosure.

Nevertheless, there are a number of problems with the ICIA approach. First, even under the ICIA, state insurance departments would be primarily responsible for the administration of a program imposed from the outside in an area to which they have traditionally ascribed little priority. Second, although the judicial remedy stands as a safeguard for ineffective state action, it is more time-consuming and costly than review of the plans by a permanent federal panel would be. Such a panel would add both expertise and continuity. An earlier version of the ICIA created such an entity within the Department of Justice.[382] Under the earlier version, if the review panel found that the state regulatory plan complied

376. *Id.* § 109(a).
377. *Id.* § 109(b).
378. 126 Cong. Rec. S2977, 80 (1980).
379. *Id.* § 120(a)(1), (2).
380. *Id.* § 120(b).
381. *Id.* § 120(c).
382. Details of this earlier draft may be found in Trends, *Potential Federal Intervention in the Insurance Industry: the Pending United States Senate Subcommittee Draft to Amend the McCarran-Ferguson Act*, 28 Drake L. Rev. 926, 928-40 (1978-79).

with the ICIA standards, there would be no additional federal involvement except for a triennial review. If the state regulatory plan did not comply with the federal standards, the panel would promulgate an "alternative state regulatory plan." The non-complying state would face the choice of implementing the alternative plan or having the Department of Justice do so. This part of the ICIA was dropped in the wake of vehement industry opposition to the circumvention of the state regulatory regime.[383]

Second, the ICIA is inferior to the Michigan Essential Insurance Plan because the ICIA fails to limit the total number of rating territories within a state. Third, as is the case under the Michigan plan, a disproportionate burden will fall upon those companies that do a substantial amount of business in urban areas. Prohibitions on agent termination will not affect those companies which withdrew from the central cities years earlier. In terms of equity, it may be preferable to implement a reinsurance exchange similar to that proposed by the FIA. Finally, ICIA's form of aggregate disclosure can be faulted. In order to best determine underwriting activity by particular companies, it is most desirable to accumulate data on a smaller level, such as by ZIP code.[384]

C. A NEW APPROACH

This article has examined the detrimental effects of insurance redlining on housing opportunities for racial minorities, on achievement of the goal of racially integrated neighborhoods, and on the vitality of central cities. Several remedies for the twin problems of unavailability and unaffordability have been advanced. The Justice Department proposal[385] addresses many of the problems associated with rigid state rate regulation. Yet it does not deal with difficulties stemming from industry perceptions of "bad risk." Further, its exemption of federally chartered companies from non-self-sustaining residual pools would only confound state efforts to alleviate problems in underserviced areas. Other alternatives are the FIA[386] and NAIC[387] proposals based on stronger state regulation. However, the history of ineffective state anti-redlining

383. The criticisms of the initial ICIA proposal are discussed in *id.* at 940-42.
384. *See* notes 274-92 and accompanying text *supra*.
385. *See* notes 297-312 and accompanying text *supra*.
386. *See* notes 313-43 and accompanying text *supra*.
387. *See* notes 127, 272 and accompanying text *supra*.

regulation[388] raises serious doubt as to whether state governments have the desire or the ability to implement major reform. Senator Metzenbaum, the author of the ICIA,[389] has asserted that "states appear unable to deal with the problems of discrimination in the cost and availability of essential insurance."[390] Since many state insurance departments and legislatures have not actively fought redlining, it is essential to consider possible federal initiatives.

It is virtually indisputable that a federal approach is constitutionally sound.[391] Insurance, an important national business, is clearly interstate commerce. In 1976, the industry generated approximately $130 billion in premiums and administered $434 billion in assets.[392] Furthermore, a federal approach is socially desirable: redlining is a national problem, not unique to a few states, and strikes hardest at older cities. Redlining threatens the success of federal urban initiatives and the vitality of American cities. As the *Dunn* decision notes,[393] insurance redlining frustrates the achievement of federal fair housing goals. To deal with these problems, and avoid the flaws of the other proposals, the author suggests a new three-stage proposal for federal action to address the redlining problem. The stages are cumulative; each represents a further step toward a comprehensive remedy.

1 First Stage. The first stage consists of actions which can be achieved relatively quickly and without major changes in regulation of the insurance industry. First, federal administrative and judicial actions may be taken pursuant to Title VIII. The disproportionate racial impact of insurance redlining and the tradition of discrimination in the real estate industry conflict with the Fair Housing Act's goals and form the rationale of the *Dunn* decision. It would be desirable to have legislation that clearly defined redlining as illegal, such as the proposed Fair Housing Act Amendments of 1980,[394] accompanied by regulations that prohibit redlining practices, using the broader definition of the term.[395]

Second, property insurance disclosure laws[396] should be en-

388 See notes 101-05, 158-72 and accompanying text *supra*.
389 See notes 162-84 and accompanying text *supra*.
390 *Rights & Remedies*, *supra* note 53, at 2.
391 See notes 93-94 and accompanying text *supra*.
392 Midwest Civil Rights Advisory, *supra* note 3, at 21.
393 See notes 221-29 and accompanying text *supra*.
394 See note 236 and accompanying text *supra*.
395 See notes 255-56 and accompanying text *supra*.
396 See notes 270-86 and accompanying text *supra*.

acted. Effective remedial action is difficult in the absence of such legislation. The data provided by disclosure would facilitate individual and public challenges to redlining practices. If the states fail to adopt disclosure legislation, federal legislation may be desirable. The NAIC Insurance Information and Privacy Protection Model Act[397] provides a paradigm for legislation concerning individual disclosure. It would be desirable, however, to go further than the Model Act and require letters of adverse decisions to state what modifications, if any, would make the property insurable. The notice should also contain definitions of redlining and unfair discrimination according to federal and state law, and set forth the legal recourse available to the applicant who believes that he or she was treated improperly.[398] Finally, the letter should inform the consumer of other insurance options (*e.g.*, other companies, local voluntary insurance placement registers, FAIR plan).

A federal aggregate disclosure law would also be desirable. The law should mandate disclosure by ZIP code of transactional and loss data for both companies and FAIR plans.[399] Insurers and FAIR plans should be required to reveal the number of policies in force, applications accepted and denied, renewals, non-renewals and cancellations. Companies should also be required to disclose the locations of their brokers and agents by ZIP code.[400] Finally, disclosure should include descriptions of territorial and classification plans and numerical data on premiums written and losses incurred within each classification and territory. The legislation should require annual reports to HUD's Assistant Secretary for Fair Housing and Equal Opportunity, the FIA Administrator and state insurance departments.

Efforts to control insurance redlining would likely be frus-

---

397. *See* note 178 and accompanying text *supra*.

398. The New York regulations (*see* note 151 *supra*) provide a model for this suggestion.

399. A federal mandate of disclosure may be objected to on the grounds that unlike banks, property insurers are not federally-chartered, licensed or insured. Data will not be used by the federal government as it is in the case of savings banks to determine whether new branches may be opened. However, since United States v. South-Eastern Underwriters, 322 U.S. 533 (1944), it has been understood that the regulation of the industry is within the congressional purview under the commerce clause. A congressional determination that sunshine is the best remedy for redlining, implicit in any disclosure bill, should pass constitutional muster.

400. The model for this legislation could be the New York legislation and regulations. For a discussion of the advantages and disadvantages of this form of disclosure, see notes 152, 290-92 and accompanying text *supra*.

trated if reliance is placed solely on Title VIII enforcement. Proof of violation may be difficult. Litigation is expensive, time-consuming and sets precedents in one district at a time. Finally, HUD has been slow in enforcement of Title VIII.[401]

Changes in the residual market are also necessary. Homeowners' insurance is essential for most urban residential property owners and should be made available through FAIR plans. This is unlikely to occur in states which have not yet provided for it unless Congress or HUD extends the definition of "essential insurance" to include the type of homeowners' coverage available in the voluntary market.[402]

2. *Second Stage.* The second stage would entail conditioning eligibility for FAIR and other housing and community development programs on the elimination of serious redlining abuses. FAIR insureds have repeatedly complained of "second-class treatment."[403] It is too early to determine whether the broadened public participation on FAIR boards resulting from the Holtzman Amendment[404] will remedy this problem. Nevertheless, the federal government, through regulation or legislation, should effectuate reform by conditioning reinsurance on the elimination by FAIR plans of:

a) Surcharges, where there is no indication as to how they may be eliminated;

b) Transactional burdens not imposed upon voluntary business (*e.g.*, requiring payment by certified check);

c) Excessive delays in approving first applications or extending coverage and paying claims; failures in providing adequate notice of cancellation; and application of charges beyond those normally prescribed in the voluntary market (*e.g.*, excessive surcharges for binder coverage); and

d) Commissions for agents writing FAIR policies which are smaller than those they would receive for writing voluntary market premiums.

Second, it may also be desirable to require states, as a condi-

---

401. See, *e.g.*, U.S. COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT, vol. II (To Provide For Fair Housing) (1974).

402. In addition, several states, *e.g.*, New Jersey (N.J. STAT. ANN. § 17:32A-2(a) (West Supp. 1980-81)), key their definitions of essential insurance to the requirements for federal reinsurance. Thus, if the Secretary termed homeowners' insurance "essential" it would automatically be included in the FAIR plans of these states.

403. See notes 39-51 and accompanying text *supra*.

404. See notes 173-74 and accompanying text *supra*.

tion for reinsurance eligibility, to establish and publicize the existence of a new formal mechanism to hear complaints of unfair insurance practices related to redlining. Though state insurance departments hear complaints, few have been aggressive in attacking redlining. Greater results might be achieved through a more visible appeals board, representing various groups concerned with the problem. Federal legislation could mandate the creation of five-member boards consisting of representatives of: (1) insurance companies; (2) agents; (3) the state insurance department; (4) the state attorney general's office; and (5) consumers. The boards should be adequately staffed to investigate complaints brought before them. They should be empowered to hear both consumer and agent complaints, to order companies to issue policies or reinstate agents, and to levy fines for unfair practices.

On the other hand, further conditions on FAIR eligibility may have undesirable consequences and the "lessons" of the Holtzman Amendment[405] must be kept in mind. Additional requirements might create pressures for states to withdraw from the UPPRA program. Once a state becomes ineligible for riot reinsurance, the industry may push for an end to the state's residual market program altogether.

Therefore, it may be necessary to condition eligibility for federal programs which are extremely attractive to states on the adoption of an aggressive anti-redlining strategy. For example, anti-redlining strategies might be made prerequisites for or important considerations in determining eligibility for Urban Development Action Grants.[406] Furthermore, if a federal property insurance disclosure law is adopted, Housing Assistance Plans (HAPs)[407] prepared in order to receive grants under Title I of the Housing and Community Development Act of 1974 could be required to include analyses of mortgage and insurance redlining data and to develop plans for overcoming unfair practices in both fields. Objective analysis of raw data would provide the basis for public and individual action and increase understanding of the actual dimensions of the problem.

3. Third Stage. Should stages one and two prove an insufficient remedy for redlining, it would be necessary to consider more direct federal action. Although the Insurance Competition Im-

405. *See* notes 176-85 and accompanying text *supra*.
406. *See* notes 264-68 and accompanying text *supra*.
407. *See* note 261 *supra*.

provement Act[408] represents such an approach, it has a number of flaws. In addition, the ICIA extends to all areas of the country, even those without significant availability problems. Therefore, the author suggests implementing a third stage only where other remedies prove insufficient.

The third stage would be effectuated if the Secretary of HUD, after conducting a formal hearing, determined that an insurance availability and affordability crisis existed within a state. The Secretary would have the authority to implement a remedial insurance plan in that state.

A crisis could be characterized by: (a) the absence of a FAIR plan eligible for federal riot reinsurance; or (b) evidence of significant redlining as documented by insurance disclosure laws. A *prima facie* finding of a crisis would exist if any judicial proceeding within the jurisdiction found unfair insurance practices, any locality's HAP indicated that such practices existed, or any finding of redlining was made by HUD or a state commission pursuant to an anti-discrimination complaint.

If such a finding were made, every insurable risk[409] within the state would be guaranteed the right to obtain essential property insurance. If an individual believed that this right was being violated, he or she would be able to complain to an appeals board empowered to order appropriate relief.[410]

Companies would be required to file territorial and classification plans with HUD and the FIA Administrator. No territorial classification should be smaller than the state, unless the company justifies smaller areas on a sound actuarial basis and the state insurance commissioner certifies the scheme to be consistent with public policy. In any event, however, no rating territory should be

---

408. *See* notes 352-81 and accompanying text *supra*.

409. Perhaps the definition of "insurable risk" should be the same as that used in the ICIA (*see* note 355 *supra*). The principle should be the same as that in the ICIA and Michigan Act: any risk meeting the objective criteria of a company's plan should be able to obtain insurance in the voluntary market.

410. The board should have similar powers to those of the Board described above in the second stage. Since the appointments would be made by HUD, the board's composition might be somewhat different. It may include: (1) the Director of the FEMA Office of Compliance and Review or his or her delegate; (2) HUD's Assistant Secretary for Fair Housing and Equal Opportunity or his or her delegate; (3) representation from an insurance company; (4) an insurance broker or agent; (5) a person employed neither by government nor the insurance industry. The state insurance commissioner should also be invited to name a delegate to serve on the board.

smaller than an SMSA.[411] As in the ICIA, maximum differences in rates by geographical territory should be established. Similarly, classifications should be justified by actuarial data and be certified as consistent with public policy.

Overall rates should be determined in the open competitive market. A company should also be able to establish reasonable surcharges, approved by the FIA Administrator, for risks within the owner's control that are shown actuarially to increase the probability of loss and which are not excessive in relation to that probability.[412]

Further, in order to avoid discrepancies in actual rates paid which result from the increased inspections and, therefore, more frequent findings of surchargeable problems in "undesirable areas,"[413] companies should be required to submit plans explaining their criteria for selecting dwellings for inspection. The FIA Administrator should have the power to disapprove the use of these criteria: geographical location, age of the dwelling, and other factors deemed contrary to public policy.[414]

In order to prevent hardships for companies required to absorb a large number of higher-risk properties, the remedial plan should be accompanied by a reinsurance exchange similar to that recommended in the *Full Insurance Availability* study.[415] In order to overcome the deficiencies that were noted in that proposal,[416] the author suggests several modifications. First, it should be an unfair practice to provide differential service to ceded (as opposed to retained) risks. Second, agents should receive the same commissions for ceded as for retained risks. Third, it should be explicitly stated that companies may not penalize agents for transacting bus-

---

411. For states not located within a standard metropolitan statistical area, only one territorial rate would be permitted for the entire state. For states partially covered by an SMSA, one rate for each SMSA within the state and another rate for the rest of the state would be permitted.

412. Companies would be required to show with actuarial data (*e.g.*, premium-to-loss ratios) that such surcharges are not excessive. In addition, the FEMA Administrator may consider establishing a ceiling on total premium surcharges.

413. *See* note 44 and accompanying text *supra*.

414. The model for this provision is MICH. COMP. LAWS ANN. § 500.2121 (Supp. 1980-81). The Michigan Act also prohibits use of market value or amount of insurance as criteria unless the amount is used as a minimum *above* which all dwellings will be inspected. Also prohibited is the consideration of personal characteristics, such as race, marital status, sex, age, handicap or lawful occupation.

415. *See* notes 339-43 and accompanying text *supra*.

416. *See* notes 350-51 and accompanying text *supra*.

iness involving a large percentage of cedes. Fourth, the exchange should randomly inspect fifteen percent of ceded risks to assure that companies ceded only insurable risks. The costs for these inspections would be borne by the exchange. All ceded risks found uninsurable would revert to the company. The formula for distribution of the exchange losses could penalize companies that ceded a disproportionate share of uninsurable risks.[417] Fifth, the FIA Administrator should have the authority to determine that a neighborhood is being underserved by the market and to order any company whose share of the homeowners' market in that neighborhood is less than its share of the statewide market to place additional agents in the area.[418]

Finally, unlike the FIA proposal, this approach would reward companies that enter traditionally underserved areas or pick up policies currently written by the FAIR plan. Any exchange surplus could be used as a buffer for future losses or for fire prevention and suppression activities, in order to reduce losses in the long-run. Exchange losses are more likely than surpluses. Such losses would be redistributed according to a formula consisting of three variables in the following order of importance: (1) Premium Volume Retained and Ceded, with a factor to reward companies for absorbing former FAIR risks;[419] (2) Premium Volume Retained in Redlined Areas;[420] and (3) Number of Uninsurable Risks Ceded to the Exchange:[421]

---

417. This is designed to address State Farm's objection that the exchange would be populated by uninsurable risks and place an inordinate burden on all good risks. *See* STATE FARM INS. CO., *supra* note 59, at 4, 14-25.

418. This would not require the Administrator to order a company which specializes in farm insurance and writes a small amount of rural homeowners' insurance to begin writing urban homeowners' insurance. Some form of hearing should be established in the program's regulations for a company to demonstrate that the order would result in undue hardship. Second, such a company's share of the statewide homeowners' market is likely to be so insignificant that the order would have little practical meaning. Finally, the limitation of this requirement to companies writing homeowners' insurance should meet the tests suggested by the courts in Insurer's Action Council, Inc. v. Heaton, 423 F. Supp. 931, 923-25 (D. Minn. (1976)) and Health Ins. Ass'n of Am. v. Harnett, 89 Misc. 2d 795, 800-01, 395 N.Y.S.2d 372, 375-76 (Sup. Ct.), *aff'd*, 59 App. Div. 2d 679, 398 N.Y.S.2d 851 (1977), *aff'd*, 44 N.Y.2d 302, 312, 376 N.E.2d 1280, 1286, 405 N.Y.S.2d 634, 640 (1978) (*see* note 348 *supra*).

419. This component assumes a FAIR plan not eligible for federal riot reinsurance. If there were no FAIR plan in effect, this term would be equal to zero.

420. Here redlined areas are defined as those ZIP codes with at least 25% of the residential properties in the FAIR plan. This term would also equal zero unless the state initially had a FAIR plan.

421. The Appendix demonstrates how the distribution formula would operate. An

$$\left[\frac{\text{Company 5-Yr. Prem. Vol. Retained + 5 Times 1-Yr. Prem. Vol. Ceded - 1.5 Times Former FAIRs Picked up by Company in Last 5 Yrs.}}{\text{Industry 5-Yr. Prem. Vol. Retained + 5 Times 1-Yr. Prem. Vol. Ceded}}\right]$$

$$+.005\left[\frac{\dfrac{\text{Company Prem. Vol. Retained in State}}{\text{Company Prem. Vol. Retained in Redlined Areas}}}{\dfrac{\text{Industry Prem. Vol. Retained in State}}{\text{Industry Prem. Vol. Retained in Redlined Areas}}}\right]$$

$$+.03\left[\frac{\text{Prem. Vol. of Uninsurable Risks Ceded by Company}}{\text{Prem. Vol. of Uninsurable Risks Ceded by Industry}}\right]$$

[In order to retain the balance between the variables, a ceiling for the middle term is set at .05].

Total points for all companies are to be added up and the distribution of losses made on the basis of the percentage of statewide distribution points received by the company.

The plan would remain in effect until the state legislature establishes a FAIR plan eligible for federal riot reinsurance. If the UPPRA program is discontinued, the plan would remain in effect until the state designs another full availability plan approved by the FIA Administrator. In any event, all policies issued under the remedial plan would remain in effect until their expiration dates, at which time state regulations would apply to both new policies and renewals.

IV. Conclusion

Insurance redlining remains an obstacle to the revitalization of the urban core and threatens the success of federal housing and community development policy goals. The regulation of the insurance industry has traditionally been a subject of state control. State regulation has come under attack from the industry and its critics: insurers asserting that rigid state rate regulation results in insurance unavailability; community groups arguing that state regulators have been insensitive to discriminatory treatment.

---

analysis of the effectiveness of these incentives would require an estimate of company use of the reinsurance exchange, level of retained risks, loss experience on the retained risks, and a calculation of the resultant loss-premium ratio. This estimate would be compared to anticipated loss of the exchange and the company's share thereof. The author is not prepared to approximate any of these figures and suggests further study in this area.

FAIR plans have played an important role in providing insurance to millions of people who otherwise would have been denied coverage in the voluntary market. Yet serious problems exist in the scope of coverage and service offered by FAIR plans. Reforms in the UPPRA program have resulted in eleven states withdrawing from the federal riot reinsurance program. The future of UPPRA is in doubt.

This article has explored several alternatives for a more effective anti-redlining program. A stronger federal role should be considered to address the problems raised by the industry and community activists, to induce innovative action and to resolve the problems of FAIR.

Meanwhile, heated debate continues. Hardest hit by unavailability and unaffordability difficulties are transitional neighborhoods in older cities and members of minority groups. So long as unavailability and unaffordability problems remain, communities without affordable insurance become communities with diminishing hope.

APPENDIX II

Section 6(c) of H.R. 5200, 96th Congreess, 2d Session (1980) would have included the following as an unfair housing practice: "For a person in the business of insuring against hazards to refuse to enter into, or discriminate in the terms, conditions, or privileges of, a contract of inusrance against hazards to a dwelling because of the race, color, religion, sex, handicap, or national origin of persons owning, or residing in or near, the dwelling."

CHILD WELFARE LEAGUE OF AMERICA, INC.

TESTIMONY OF

DAVID S. LIEDERMAN
EXECUTIVE DIRECTOR
CHILD WELFARE LEAGUE OF AMERICA

Mr. Chairman, members of the Subcommittee, Good Morning. My name is David Liederman, and I am the Executive Director of the Child Welfare League of America. On behalf of the children and families that our member agencies serve, I want to thank you for this opportunity to testify before you this morning regarding the issue of housing for families and children in America.

As you know, the Child Welfare League of America (CWLA) is an association of some 450 leading child and family service agencies in the United States and Canada, with an additional 1200 affiliates in 29 states associations. We are the largest privately supported membership based organization in North America soley dedicated to advocating for the service needs of children and families. Our membership includes private voluntary, public, religious and non-sectarian agencies. Our members include The California Association of Services for Children, and Children's Service Society of Wisconsin.

The topic of today's hearing has both a profound interest to CWLA as an organization and to myself personally as a professional. Some 20 years ago I began my career in social work in a Boston Housing Project. Ever since those days I have been acutely aware of the housing needs and issues affecting families and children.

I would like to focus my remarks today on the problems children and families face as they desperately seek affordable and and safe housing. We know from recent studies that children and their families are experiencing an unprecedented increase in stress related to meeting their housing needs. More one-parent families, more working parents with small children, more poor families, less affordable housing for low and moderate income people, more restrictive public assistance programs, less natural and social supports for the family system. Those are the apparent problems but unfortunately there are the subtle, and in some ways, more dangerous problems facing children and families in the housing market -- discrimination is a prime among them. A study of the nationwide prevalence of housing discrimination against families commissioned by the U.S. Department of Housing and Urban Development showed that in 1980, 76% of rental apartment units in the country operated under some form of exclusionary policies that discriminated against families with children. Clearly the discrimination issue is at the apex of the availability problem.

The membership of CWLA applaudes the efforts of the chairman and the co-sponsors of the H.R. 1158 for extending to the coverage of Title VIII to make unlawful discrimination based on "familial status." We are also supportive of improved and strengthened enforcement provisions including the use of Administrative Law Judges and a more responsive system for settling discrimination allegations.

Mr. Chairman, in your home state of California, prior to the establishment of state protection, five major cities excluded children from at least half the local rental housing market. In one city, more than 70 percent of all rental housing was closed to children. In the city of Portland, Oregon a recent study showed that 43% of its rental units did not allow families with children. And in Dallas, Texas, another study found 85 percent

of a newly constructed rental housing excluded children and their families.

Right here in Silver Spring, Maryland, Mrs. Dianne Betsey went all the way to the Fourth Circirut Court to seek protections for herself and 70 other families with 107 children from being harrassed and evicted from their apartments. As Mrs. Betsey told this committee last year, she sought the help of all appropriate government offices from the local level all the way to her Congressman and could not find appropriate means of recourse. Throughout the three-year court battle, she detailed incidents of school-aged children forbidden to enter their apartment building in groups, car windows smashed, mysterious cases of arson and rents raised only for those families with children. Mrs. Betsey lost at every level of enforcement until finally the Fourth circut court overturned an earlier decision. Unfortunately all 107 families had already been displaced over the course of the four-year legal struggle.

To find housing today is a difficult task indeed. To be poor and working class and to find housing is inordinately difficult. To be poor and to have children and to find housing is nearly impossible. The past ten years have witnessed a virtual decimation of low-income housing supply in most American cities. During the same period, the poverty population of the cities has increased substantially. Less low-income housing for more low-income people predestines an increase in the numbers without housing. Discrimination against families with children means more homeless children.

A month ago the Child Welfare League of America and Travelers Aid International released a study of Homeless Children and Families. This study is part of a larger effort to study the issue of families and children who are homeless.

Among the findings was the strong correlation between the lack of available and affordable housing and homelessness. We found that of for every 10 homeless people in America, 8 chidlren are affected. This startling statistic underlines and reinforces the U.S. Conference of Mayors study which revealed a 25% increase in the number of homeless children and families. Recently the New York Times reported a study that noted families with children as the largest group within the homeless population, accounting for some 35%. These numbers represent real families -- American families that can not locate affordable housing and therefore end up homeless.

One may think that discussions of affordability before this committee may be inappropriate; however, housing costs may also represent a sublte form of discrimination. As former housing projects are quickly rennovated into luxury condominiums both the availability and affordability issues surface. With less units available coupled with more expensive prices for existing units we find more and more families must seek shelter in public housing. We currently know that there are twice as many families seeking low-income housing as their are units available. The Council for Large Public Housing Authorities summed up the current situation in a September 1986 report: "families with children face bleek odds for finding units in many markets." Other studies support that statement:

- o A recent study in New Jersey of Fair Market Rent (as determined by H.U.D.) for a family of four (single mother with three children) is $616.00 per month. That amount is 132% of what that mother might expect to receive if she were eligible for AFDC. (Association for Children of NJ, January, 1987.)

- In 1975, 38% of those with income below 50% of median income paid more than half their income for rent. In 1983, 49% were paying this much. (GOA Study, April, 1985)

In addition, CWLA, is encouraged by the committee's commitment to include persons with handicaps as part of the protected classes. Families with children experience difficulty in obtaining housing; families with children who are handicapped often face many more obstacles to housing than other families. As we have encouraged families to keep their handicapped members at home or as service providers we strive to put in place community-based services it is essential to have some protections guaranteed. We urge the committee to continue its work with the disability community to establish language that accomplishes this goal.

In 1949, the U.S. Government made a commitment to "provide a decent home and suitable living environment for every American family." Unfortunately something happened to this goal on the way to the end of the 1980's. Housing and Community Development programs have been slashed from $31.9 billion in 1981 to $13.3 billion in FY 1987.

Mr. Chairman, it was almost 20 years ago when the Congress passed the Fair Housing Act, promising much to our nation but to date, delivering precious little. The late Patricia Harris, Secretary of H.U.D. and H.H.S. called Title VIII a "law without teeth." We are grateful that, for the first time, Congress has recognized children and their families as a protected class of people for the purposes and intent of this law. We know that of the two and one-half million instances of housing discrimination reported by H.U.D., many are families with children. Anyone who opens a newspaper to the "FOR RENT" section or who has gone about the task of searching for a rental unit in cities across America

has seen the "adults only," signs and restrictions. I cannot help but stop and wonder at the irony of our society as we champion the virtues of the family yet turn our backs to the exclusion of families and children from a safe and decent home. Are we really saying "children are undesirable?"

This is not a small problem for a few families in the larger urban areas. Seventy-three percent of all American households have children present, many are at risk. Obviously it is those families within the lower income brackets that are most in danger of this discriminatory practice.

In 1980 H.U.D. commissioned several major studies and found that "no children" policies hurt families by causing them to search for longer periods of time for their housing and pay higher costs for shelter of lower quality. In another nationwide study by H.U.D., more than 25% of all rental units studied were closed entirely to children and another 50 percent imposed restrictions that limited the age or number of children who could be admitted to the residence.

Mr. Chairman, as this nation continues its quest for military power and international prestige, we have allowed far too many of our children to grow up with no place to call home.

As this bill proceeds through the Congress, please be especially vigilent in protecting families and children as a new class under the law. The Child Welfare League of America appreciates the endorsement of the National Association of Realtors with regard to including families and children as a protected class and agrees that projects designed specifically for housing for the elderly be exempt.

It is time to establish a national anti-discrimination standard for treatment of families seeking homes anywhere in the United States. The existing 16 state statutes offer varying degrees of fair housing protection to families but none can offer assurance of coverage for all families; that is your province. Please provide a minimum level of fair housing protection for families with children as part of the overall effectiveness of Title VIII.

Mr. Chairman, thank you for your time and the privilege to share these thoughts with you.

Children's Defense Fund

122 C Street N.W.
Washington, D.C. 20001

Telephone (202) 628-8787

Marian Wright Edelman
President

Peggy Lampl
Executive Director

James Weill
Program Director

April 2, 1987

Board of Directors

Hillary Rodham Clinton, Chair
Attorney, The Rose Law Firm

J. LeVonne Chambers
Director, NAACP Legal Defense and Educational Fund

Laura Chasin
Social Worker

Marian Wright Edelman
President, Children's Defense Fund

Winifred Green
President, Southern Coalition for Educational Equity

Lucy Hackney
Attorney, Juvenile Law Center, Philadelphia

Dorothy I. Height
National President, National Council of Negro Women

Vernon E. Jordan, Jr.
Attorney, Akin, Gump, Strauss, Hauer & Feld

James A. Joseph
President, Council on Foundations

Ruby G. Martin
Attorney, Martin & Ass.

Charles E. Merrill, Jr.
Founder, Commonwealth School

Joseph L. Rauh, Jr.
Attorney, Rauh, Board and Lichtman

Donna E. Shalala
President, Hunter College

Susan Thomases
Attorney, Wallace, Farr & Gallagher

Thomas A. Troyer
Attorney, Cogen & Chrystie

Ruth Wattar
Commissioner of Public Health, The Commonwealth of Massachusetts

Eddie N. Williams
President, Joint Center for Political Studies

The Honorable Paul Simon
Chairman, Subcommittee on the
Constitution
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: S. 558, Fair Housing
Amendments Act of 1987

Dear Mr. Chairman:

The Children's Defense Fund ("CDF") is a privately supported public charity that for nearly 15 years has sought to serve as an advocate for children and their families, especially those who are poor. CDF's goal is to educate the nation about the needs of children and to encourage preventive measures that will protect and promote their full and healthy development. CDF's work spans a broad range of public policy issues, including family support systems, health care, education, youth employment, child care, and housing. Decent housing is critical to the physical and emotional well-being of families. It helps provide the security and stability that children need as they grow up.

As President of CDF, I write to urge the Subcommittee on the Constitution to take appropriate action to eradicate a national scourge, pervasive housing discrimination against families with children. Unlike many of the problems that face our nation's families, the problem of housing discrimination has a solution that is both obvious and feasible without a substantial investment of federal funds. Congress can and should amend the Fair Housing Act to outlaw such discrimination.

1. A Significant and Growing Number of Families Depend on Rental Housing for Shelter.

The population affected by housing discrimination against families is large. According to census data, in 1985 approximately 18 million families (28% of all families) lived in rental housing. Of these families, 11.4 million (approximately 64%) are families with children. Thus, almost 1 out of 5 families has children and depends on rental housing for shelter.

Each year since 1980, the number of families with children that depend on rental housing for shelter has grown by almost one-half million. Thus, while in 1980, only 1 in 7 families both rented and had children, the figure today is nearly 1 in 5.

2. Families With Children Face Pervasive and Increasing Discrimination in the Housing Market.

Study after study confirms that families with children face widespread discrimination in the housing market. Investigators who have recently studied the matter have found that housing discrimination against families is a serious problem.

A study of the nationwide prevalance of housing discrimination against families commissioned by the U.S. Department of Housing and Urban Development showed that, in 1980, fully 76% of the rental apartment units in the country operated under exclusionary policies that kept out families with children. Twenty-six percent of all rental units totally excluded children and another 50% had policies that restricted the number of children or age or sex of children in a unit or imposed similar sorts of restrictions that limited occupancy by families with children.

Other studies in selected areas of the country confirm HUD's finding that housing discrimination against families with children is widespread. A study published in 1979 of five major cities in California found exclusion rates ranging from 50% to 70%, except in one city, San Francisco, which had enacted an ordinance prohibiting discrimination. A study in 1978 in Dallas, Texas, revealed that 52% of the 432 apartment complexes surveyed refused to accept children, while 12% accepted children only under limited circumstances. A study in 1979 in Atlanta, Georgia, uncovered that of 633 apartment complexes (total units, 48,235), 27% of the units surveyed barred children and an additional 25% had occupancy restrictions that limited their avaliability to families with children.

In addition, figures compiled by HUD in 1982 show that of households issued Section 8 certificates for subsidized rental units families with children are far less likely to secure

suitable housing than are other families or households. These certificates, which provide rental subsidies, expire if the household to which they are issued cannot find qualified housing within 60 days. The rate of expirations, or failures, for families with children is exceptionally high, from 60% to 78% among minority families and from 56% to 76% among nonminority familes.

Furthermore, discrimination against families with children is increasing. The HUD prevalance study showed that the exclusion rate nationally jumped from an estimate 17% in 1974 to 26% in 1980. The local studies in California and Dallas confirm that the trend is toward increased discrimination against families with children in the housing market.

The Council of Large Public Housing Authorities summed up the current situation in a September, 1986, report: "families with children face bleak odds for finding units in many markets." Council of Large Public Housing Authorities, Public Housing Today, p.9 (Sept. 1986).

3. Housing Discrimination Against Families With Children is Aggravating the Housing Crisis These Families Currently Face.

Families with children are facing a housing crisis. The costs of shelter have soared in recent years, and fewer and fewer families can find or afford suitable housing for their children.

Housing discrimination both contributes to and aggravates the current crisis, by artificially restricting the amount and type of housing available to families with children. A restricted market means that families with children must search longer and harder to find housing and that these families must pay higher rents for the housing they find. It also means that many families must seek shelter in public housing. (As the Council on Large Public Housing Authorities has reported, "anti-family discrimination often makes public housing a necessity." Id.). Finally, it means that many families will be homeless. As the Subcommittee on the Constitution is well aware, the ranks of the homeless are swelling with children. Indeed, a report released this week by The Partnership for the Homeless in New York, based on a survey of 47 cities, indicates that families with children have become the biggest segment of the homeless population.

Our nation needs to commit itself to increasing the supply of adequate and affordable housing so that decent shelter will be available to all. This effort must go hand-in-hand with efforts to ensure that existing shelter is equitably distributed.

4. Housing Discrimination Against Families With Children Often Masks Discrimination Against Minorities and Women and Contributes to the Perpetuation of Segregated Housing Patterns.

In many instances, landlords employ restrictions on occupancy by children as a means to limit or deny housing to minority and female-headed families. Using interviews of renters with children in 19 metropolitan areas, one study concluded:

> Among the respondents..., minorities were the most heavily burdened by serious problems caused by restrictive rental policies. The severity of their burden may be the result of insufficient income. However, even among those with incomes of $15,000 and above, a statistically significant difference was found between the frequency of serious problems experienced by minority complainants and those experienced by white complainants. This raises the question as to whether at times no-children policies are a smokescreen for racial discrimination.

Green & Blake, How Restrictive Rental Practices Affect Families With Children pp.3-4 (1980)(prepared for HUD). A study conducted by the Rand Corporation found that among black families with children, being a family with children was cited more frequently as a cause for discrimination than was race.

Even when not intentionally used to discriminate on the basis of race or sex, restrictive occupancy practices perpetuate segregated housing patterns. Adult-only housing is concentrated in white communities. (For example, a 1978 study found that in Dallas, 68% of all such units were in white communities and only 11% in minority communities). Yet, minority and female-headed families are disproportionately represented among renting families with children. While 25% of white families rent, 52% of black families and 53% of female-headed families rent. In addition, while 61% of renting white families have children, 76% of black families and 81% of female-headed families that rent have children. Thus, the burden of restrictive occupancy practices fall most heavily on minority and female-headed families, adding an additional barrier to their renting in white communities.

In barring discimination against families with children, Congress would not embark on unchartered waters. Statutes and ordinances outlawing such discrimination are working well in a variety of states and cities. However, too few states and localities have taken necessary action, and the problem is one of national dimensions. Accordingly, it is fitting that Congress act.

Thank you for the opportunity to make my views known to the Subcommittee.

Sincerely,

Marian Wright Edelman
President

Children's Defense Fund

122 C Street, N.W.
Washington, D.C. 20001

Telephone (202) 628-8787

June 5, 1987

The Honorable Paul Simon
Chairman, Subcommittee on the
Constitution
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Children's Defense Fund is pleased to endorse S. 558, the Fair Housing Amendments of 1987. As indicated in our letter of April 2, we believe this legislation is essential, and will lend our efforts to ensure its expeditious enactment.

The new provision which extends protection to families with children is of particular importance to us. We thank you for your efforts to ensure that discrimination is not allowed to exacerbate the difficulty that all families, but especially low income and minority families, face in their efforts to find decent and affordable housing.

Again, our thanks and our support for your efforts.

Sincerely,

Marian Wright Edelman
President

LM:cf

Consortium for
Citizens with
Developmental
Disabilities

June 22, 1987

The Honorable Paul Simon
Chairman
Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Consortium for Citizens with Developmental Disabilities (CCDD) and other national organizations who work for the rights of persons with disabilities are writing to express our support for the Kennedy-Specter substitute for S. 558, the Fair Housing Amendments Act of 1987. Our agencies represent the over 36 million Americans with disabilities who have already been waiting too long for the protections you will be assuring in this bill.

Housing discrimination on the basis of handicap has greatly diminished the ability of these Americans to truly become independent and integrated in American society. The many victories people with disabilities have won in education, employment and health care provided them the opportunity to live more productive lives. And yet, too many are denied the right to live where they choose, where they can best work and be a part of their communities.

We strongly urge your support for the Kennedy-Specter substitute as it moves through mark-up. In particular we request your endorsement of the clarifications regarding discriminatory actions in the future construction of multi-family housing.

Your support of this long-awaited legislation will assist millions of Americans in becoming integrated and achieving independence. Thank you.

Sincerely,

Alexander Graham Bell Association
American Academy of Child and Adolescent Psychiatry
American Association of the Deaf-Blind
American Association of University Affiliated Programs
American Association on Mental Deficiency
American Council of the Blind
American Deafness and Rehabilitation Association
American Foundation for the Blind
American Occupation Therapy Association
American Physical Therapy Association
American Speech-Language-Hearing Association
ACLD, An Association for Children and Adults with Learning Disabilities
Association on Handicapped Student Service Programs in Secondary Education
Association for Retarded Citizens/US
Association for the Education of Rehabilitation Facility Personnel
Center for Law and Social Policy
Child Welfare League of America
Conference of Education Administrators Serving the Deaf
Convention of American Instructors of the Deaf
Council for Exceptional Children
Disability Rights Center
Disability Rights Education and Defense Fund
Disabled American Veterans
Epilepsy Foundation of America
Goodwill Industries of America
International Association of Parents of the Deaf
Mental Health Law Project
National Alliance for the Mentally Ill
National Association of the Deaf
National Association of Developmental Disabilities Councils
National Association of Private Residential Facilities for the Mentally Retarded
National Association of Protection and Advocacy Systems
National Association of Rehabilitation Facilities
National Association of Rehabilitation Professionals in the Private Sector
National Association of State Mental Retardation Program Directors
National Center for Law and the Deaf
National Centers on Independent Living
National Council on Rehabilitation Education
National Down Syndrome Congress
National Easter Seal Society
National Fraternal Society of the Deaf
National Head Injury Foundation
National Mental Health Association
National Rehabilitation Association
National Society for Children and Adults with Autism
National Spinal Cord Injury Association
Paralyzed Veterans of America
Spina Bifida Association of America
The Association for Persons with Severe Handicaps
United Cerebral Palsy Associations, Inc.
World Institute on Disability

CWLA CHILD WELFARE LEAGUE OF AMERICA, INC.
440 FIRST STREET, N.W. • WASHINGTON, D.C. 20001 • (202) 638-2952

PRESIDENT
Mac Bell Hurley
Chattanooga, TN
VICE PRESIDENTS
Jane K. Parker
St. Louis, MO
John C. Corman
Glencoe, IL
Martha Stennis
Jackson, MS
SECRETARY
Sharon A. DeGrandpre
Manchester, NH
ASSISTANT SECRETARY
Clifford W. Fatby
Boston, MA
TREASURER
John L. Robins
Seattle, WA
ASSISTANT TREASURER
George T. Hubbard
New York, NY
BOARD OF DIRECTORS
Paul H. Anderson
Atlanta, GA
Samuel F. Berman
Los Angeles, CA
Joyce M. Black
New York, NY
Judith S. Bluck
Chicago, IL
James H. Buford
University City, MO
Lydia Cameron
Orinda, CA
Reinaldo Cardona
New York, NY
Marilyn Cox
Phoenix, AZ
Nan Dale
Dobbs Ferry, NY
Anne Duncan
Houston, TX
Marie Gelinas
Montreal, Quebec
James M. Kurer
Worcester, MA
Nic L. Knapp
Knoxville, TN
Terry Lenzner
Washington, DC
Robert K. Massey
Jaffrey, NH
John F. Merchant
Fairfield, CT
Frank L. Oberly
Oklahoma City, OK
Emily Palmer
Detroit, MI
Richard G. Pluta
Plymouth, MN
Norman W. Powell Jr. Ed.D.
Ft. Lauderdale, FL
Joan F. Putnam
Springfield, MA
Peter Quinn
New York, NY
Ann Reynolds, Ph.D.
Boston, MA
Elizabeth Rohatyn
New York, NY
Lucy M. Salyer
Villanova, PA
Judith Sherman
Beachwood, OH
S. Norman Sherry, M.D.
Cambridge, MA
Merle E. Springer
Clearwater, FL
Msgr. Bryan O. Walsh
Miami Shores, FL
Bruce W. Wert
Akron, OH
HONORARY MEMBER
Mrs. Ben W. Heineman
Chicago, IL
EXECUTIVE DIRECTOR
David S. Liederman
DEPUTY DIRECTOR
Joyce Strom

May 20, 1987

The Honorable Paul Simon
462 Dirksen Senate Office Building
Washington, D. C. 20510

Dear Senator Simon:

The undersigned organizations applaud the introduction of the Fair Housing Amendments of 1987 (S. 558) and strongly urge that this bill be passed expeditiously. The bill takes great strides in providing necessary enforcement provisions, including the use of Administrative Law Judges, to Title VIII. Furthermore, the protections extended to handicapped people are urgently needed and appropriately defined within the existing bill. Of particular importance and concern to our organizations is the new provision extending protections against discrimination to children and their families. Families have waited for almost 20 years to be afforded the protections contained with the Fair Housing Act. The time is now to work for passage.

On the morning of Wednesday, April 22, 1987, The Washington Post, Classified Section contained an advertisement for rental property in suburban Washington that heralded its policy of "NO MONSTERS" -- to compound this blatant example of excluding children they parenthetically added "(or perfect angels)." This is an appalling example of discrimination! As a nation, we cannot simultaneously champion the virtues of the family and yet turn our backs to the increasing limit of available rental units for households with children.

The discrimination currently being experienced by children and their families in the already depleted and excessively expensive rental housing market is creating a national crisis. Currently we know that children and their families represent the largest group of people who are homeless in the United States. In a recent study by the Child Welfare League of America, it was reported that for every 10 homeless adults, 8 children are affected.

According to a Department of Housing and Urban Development study, we know that more than 25% of all rental units were closed entirely to children and another 50% imposed restrictions that limited age and number of children who could be admitted.

CHILD WELFARE LEAGUE OF AMERICA, INC.

If we look to history and remember the complacency in which our "free and just" society allowed the "NO COLOREDS", and "WHITES ONLY" signs, then we will also remember the shame of discrimination and act quickly to eradicate this modern day example of housing discrimination. Please be vigilant in your support of this provision.

Thank you,

American Academy of Pediatrics
American Association on Mental Deficiency
American Civil Liberties Union
American Ethical Union
American Planning Association
Association for Retarded Citizens
Child Welfare League of America
Children's Defense Fund
Disability Rights Education and Defense Fund
Easter Seals Society
Epilepsy Foundation of America
La Raza
Lutheran Office for Government Affairs
National Association for Protection and Advocacy Systems
National Committee Against Discrimination in Housing
National Low-Income Housing Coalition
NETWORK: A Catholic Social Justice Lobby
United Cerebral Palsy
United States Catholic Conference

HOUSING OPPORTUNITIES MADE EQUAL
503 EAST MAIN STREET
RICHMOND, VIRGINIA 23219
TELEPHONE (804) 648-0116

OFFICERS
Paul G. Turner
President
Valorie F. Wallace
1st Vice President
Daniel T. Murphy
2nd Vice President
Nancy Kopf
Secretary
Carrie E. Knighton
Treasurer

EXECUTIVE DIRECTOR
R. Kent Willis

FOUNDING DIRECTOR
Dr. Barbara Wrubel

BOARD OF DIRECTORS
David P. Baugh
Arthur L. Blackwell, Jr.
Norma Blalock
Winston W. Calvert
Charles D. Chambliss, Jr.
Sandra C. Coles
Eileen M. Dooley
Rev. John S. Fontaine
Susan V. Fore
Roger L. Gregory
Paul W. Jacobs, II
Denise Jenks
Timothy Kelly
Rev. Charles A. Kelly
Carrie E. Knighton
Nancy Kopf
Donald J. Lawrence
Dr. Thomas R. Morris
Daniel T. Murphy
James E. Naggles
Rev. James A. Pavne
Virginia H. Ritchie
Rev. S. P. Spottswood
Richard D. Taylor, Jr.
Veronica F. Templeton
Paul G. Turner
Valorie F. Wallace
F. Case Whittemore

FRIENDS OF HOME
Hon. Gerald L. Baliles
Hon. Thomas J. Bliley, Jr.
Mr. & Mrs. R.H. Bunzl
Mary Tyler Cheek
John R. Chiles
Jean W. Cunningham
William V. Daniel
Frederick Deane, Jr.
Wilma J. Dell
Joan P. Dilworth
Rev. John D. Edens
Rev. E.L. Fleming, Sr.
Lawrence N. Framme, III
Dr. Franklin J. Gayles
Rt. Rev. Robert F. Gibson
Bradley H. Gunter
Hon. Franklin P. Hall
E. Bruce Heilman
V.W. Henley
The Rev. Canon Robert G. Hetherington
Dr. M. Philmore Howlette
Hon. Robinson B. James
Rev. Miles Jerome Jones
Randolph C. Kendall, Jr.
Walter T. Kenney
Hon. Benjamin J. Lambert, III
Hon. Leonard W. Lambert
Sydney & Frances Lewis
Hon. Henry L. Marsh, III
Rev. Samuel D. McCammon, Jr.
Claudette B. McDaniel
John M. McGurn
Wayland W. Rennie
Richard S. Reynolds, III
Henry W. Richardson
Hon. Charles S. Robb
Dr. Frank S. Royal
Bishop John J. Russell
Mrs. David E. Satterfield, III
Dr. David T. Shannon
S. Dallas Simmons
Rabbi Jack D. Spiro
Bishop Walter F. Sullivan
Lee C. Tait
Hon. Mary Sue Terry
Dr. William S. Thornton
Clarence L. Townes, Jr.
James W. Tyler
Hon. Rev. A. West
Hon. L. Douglas Wilder
Galvine B. Williams

April 9, 1987

The Honorable Paul Simon, Chairman
Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
Washington, D.C.

Dear Senator Simon:

I would like to thank you for the opportunity to submit to your committee a statement in support of the Fair Housing Amendments Act of 1987.

HOME ranks among the foremost fair housing organizations in the nation, having successfully promoted equal housing opportunities in the Richmnd metropolitan area since 1971. Despite our many accomplishments, we see a strong need for expansion of the Fair Housing Act of 1968. The proposed amendments, if passed by Congress, will take us yet another step closer to equal housing opportunities for all citizens.

Once again, I thank you for this opportunity.

Sincerely,

R. Kent Willis
Executive Director

RKW:mp

Enclosure

Statement of R. Kent Willis
Executive Director
Housing Opportunities Made Equal of Richmond (HOME)

STATEMENT IN SUPPORT OF THE FAIR HOUSING AMEMDMENTS ACT OF 1987
ADDRESSING THE PROPOSED USE OF ADMINISTRATIVE LAW JUDGES

This statement is offered in support of the proposal currently before you to strengthen the enforcement mechanisms of the Fair Housing Act of 1968 through the use of independent administrative law judges. As an organization that has litigated fair housing cases for more than 15 years, HOME understands the need for a strong, speedy and accessible enforcement mechanism that will enable most victims of housing discrimination to resolve complaints without the excessive obstacles placed before them by the state and federal court systems.

For HOME, litigation works. It is the most effective means by which we are able to compensate individuals who have been victims of housing discrimination. On a broader scale, it promotes fair housing in our community by demonstrating that the fair housing law is enforceable and that violating it can be costly.

But organizations such as HOME are rare. The vast majority of localities in the country have no fair housing organizations. Of those that do, most are state or local agencies which, at best, enforce the fair housing law through the notoriously ineffective conciliation process. In Virginia, for example, HOME, which serves only the 600,000 residents of metropolitan Richmond, is currently the only funded fair housing group that

litigates. This leaves the remaining 4,800,000 residents of Virginia without a local support organization for litigation. Virginia, I might add, is not atypical in this regard. Outside of Ohio, California, and New York, no state in the country has more than three fair housing organizations actively litigating fair housing cases, all of which limit their activities to local areas.

Although some may argue that successful fair housing litigation does not require sophisticated organizational support, I strongly disagree. HOME recruits and trains attorneys who will accept fair housing cases on a pro bono or significantly reduced cost basis. HOME also counsels victims of housing discrimination, offering them professional support services while patiently preparing them for the long and arduous journey required of a plaintiff in a federal or state court case. Combined, these two services ease the financial and psychological strain of litigating fair housing cases and enable a high percentage of complainants to take the next, difficult step toward becoming a plaintiff in a law suit. But for the vast majority of citizens of our country who do not have access to a group such as HOME, the natural fear of the court system, the complexities and personal invasions of litigation, the six-month to two-year wait for trial, and the enormous financial burden make litigation an unacceptable way of seeking redress for an act of discrimination.

With these obstacles facing such a large portion of our population, it is no surprise that since 1968 so few victims of

housing discrimination have sought to use litigation as a means of resolving their complaints. Title VIII gives us an accessible but often ineffective conciliation process and an inaccessible but often effective legal process, with an enormous void in between.

By proposing to place administrative law judges in this void, this amendment may be the single most important advancement toward assuring minority housing consumers of proper protection under the law since the 1968 fair housing legislation was passed. Administrative law judges offer an easily understood method of enforcement, thus breaking down the realities (and myths) of a court system that intimidates and dispirits many would-be litigants. Administrative law judges provide a far less costly alternative to the court system yet may provide remedies that are equally strong. Administrative law judges also operate in a much speedier system, reducing lengthy and painful waiting periods for plaintiffs from years to months or weeks.

In summary, while litigation is an effective method for enforcing our fair housing laws, it is not a viable alternative for most of our citizens. Most citizens simply do not have access to the few professionally staffed organizations necessary to make litigation a practical fair housing tool. Administrative law judges, on the other hand, bring a speedy, less costly, and more accessible method of enforcement to a far greater number of people. I therefore recommend highly the addition of this enforcement mechanism to our existing federal fair housing law.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA—UAW

OWEN F. BIEBER, PRESIDENT RAYMOND E. MAJERUS, SECRETARY-TREASURER

VICE PRESIDENTS

BILL CASSTEVENS • DONALD F. EPHLIN • ODESSA KOMER • MARC STEPP • ROBERT WHITE • STEPHEN P. YOKICH

IN REPLY REFER TO
1757 N STREET N.W.
WASHINGTON, D.C. 20036
TELEPHONE (202) 828-8500

February 3, 1987

Dear Senator:

The federal fair housing law is not nearly as effective as it should or could be. You will have an opportunity to help correct the deficiencies by cosponsoring legislation which will be introduced soon.

The UAW, together with other organizations in the Leadership Conference on Civil Rights, urges you to join in sponsoring the proposed Fair Housing Amendments Act which would provide an effective administration remedy for individual victims of discrimination. The bill also would make other improvements in the statute by extending its coverage to disabled persons and families with children. The bill would amend the nation's fair housing statute — Title VIII of the Civil Rights Act of 1968.

The improvements proposed in the fair housing legislation are needed to make the existing protections effective as tools to prevent discrimination in housing. Incidents of such discrimination literally number in the hundreds of thousands every year, according to estimates by the Department of Housing and Urban Development.

You can become a sponsor by having your staff call Mike Frazier of Senator Kennedy's staff at 224-4543 or Neal Manne of Senator Spector's staff at 224-4254. Thank you for your consideration of the UAW's request that you cosponsor the fair housing legislation.

Sincerely,

Dick Warden
Legislative Director

DW:car
opeiu494
113

NAGEOTTE & BORINSKY, P.C.
ATTORNEYS AT LAW
14908 JEFFERSON DAVIS HWY
WOODBRIDGE, VIRGINIA 22191-3997

(703) 491-4136
NO. VA. & D.C. Metro 690-3213
MD. Metro 643-2202

RICHARD R. NAGEOTTE
DANIEL H. BORINSKY
RONALD C. McCORMACK
JAMES S. KREIN

G. DAVID TYRIE
(1943-1975)

June 11, 1987

The Honorable Paul Simon, Chairman
Subcommittee on the Constitution
United States Senate
SD-462 Dirksen Senate Office Building
Washington, DC 20510

RE: Subcommittee Hearings of June 9, 1987 (S558)

Dear Senator Simon:

I wish to thank you for the opportunity to appear as a witness before your Subcommittee. I cannot emphasize enough the importance of the right of trial by jury as protected by the Seventh Amendment of the Constitution of the United States as a fundamental liberty of the citizens of our country. I am always happy to be given the opportunity to share my views concerning this important protection with others who may not have occasion to observe the American Jury in operation as often as I do.

I wish to clarify a matter which came up at the end of the hearings. Several persons expressed concern that the concession contained in my letter of May 28, 1987, that in some circumstances, the Atlas Roofing case allowed for administrative assessment of civil penalties without the need for trial by jury, was intended to be a concession with respect to S558. Please be advised that this is not true, as the enforcement provisions of S558 conflict with the guidelines established by the Supreme Court in Atlas Roofing to allow administrative assessment of civil penalties. In my opinion, both the cause of action created in S558, i.e. one that sounds in tort and/or contract and the relief provided, i.e. compensatory damages, punitive damages, and civil penalties constitute a private cause of action. Accordingly, the enforcement provision of S558 would not fall within the limited exception allowed by the Supreme Court in Atlas Roofing. The decision in Atlas Roofing was specifically limited to public rights and excludes private rights.

Please accept my apologies for any confusion that the statement contained in my letter of May 28, 1987, may have created. It is respectfully requested that this letter be attached to my letter of May 28, 1987, to supplement and clarify the record. I am, by copy of this letter to each member of your Subcommittee, advising them of this clarification.

Please do not hesitate to contact me if I can be of further service to you, your Subcommittee, or any of your colleagues who face similar issues relating to the Seventh Amendment. With kindest regards, I remain

Very cordially yours,

Richard R Nageotte

RICHARD R. NAGEOTTE

RRN/jkb

Enclosure

cc: Senator Howard M. Metzenbaum
Senator Dennis DeConcini
Senator Edward M. Kennedy
Senator Arlen Specter
Senator Orrin G. Hatch
Senator Strom Thurmond

STATEMENT OF THE
NATIONAL ASSOCIATION OF INDEPENDENT INSURERS
ON S. 558
THE FAIR HOUSING ACT AMENDMENT OF 1987
BEFORE THE
CONSTITUTION SUBCOMMITTEE
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
APRIL 2, 1987

This statement is presented on behalf of the National Association of Independent Insurers (NAII), a property and casualty insurance trade association comprised of more than 500 member companies.

NAII urges the exclusion of insurance from Section 6 of S. 558. We ask that this statement be inserted in the record of those hearings.

Our companies represent a cross-section of the property and casualty insurance business in the United States. They range in size from the smallest one-state companies to the very largest national writers. They comprise both stock and non-stock corporations and reflect all forms of merchandising: independent agency, exclusive agency, and direct writers. They include insurers who serve the general market and those which specialize in serving particular consumer groups such as farmers, teachers, government employees and military personnel.

BACKGROUND

The enactment of this legislation would have a far-reaching impact on the regulation of the entire property insurance industry, an impact which will adversely affect the interests of both insurers and insureds alike.

S. 558 would amend Title VIII of the Civil Rights Act of 1968 (P.L. 90-284, 42 USC 3601 et seq.), also known as the Fair Housing Act. Section 6 of the bill states:

> "It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in terms and conditions of such a transaction, because of race, color, religion, sex, handicap, familial status or national origin.

The bill goes on to define, in part, "residential real estate-related transaction" as "the insuring of titles to real estate or against hazards to dwellings."*

The effect of the bill, and obviously among its purposes, is to bring property insurers within the scope of the Fair Housing Act and within the regulatory jurisdiction of the Department of Housing and Urban Development (HUD). In furtherance of its objectives, S. 558 substantially increases the enforcement, administrative and rule-making authority of HUD under the Fair Housing Act. The assumption by HUD of a regulatory role over the business practices of the property insurance industry in providing hazard insurance would be the end result of the bill.

Similar legislation, S. 506, was considered by the Senate in 1980. The Judiciary Committee in considering S. 506, took out the insurance reference. We ask that the committee again show its good judgment by removing the insurance reference from Section 6 of S. 558.

During the Senate debate of December 9, 1980, Senator Heflin so ably pointed out that the "...majority of the subcommittee members felt that, while insurance redlining should not be tolerated, the States and their experienced insurance regulatory agencies are in the best position to curb such insurance practices."

He went on to state "...extension of title VIII to the property insurance industry would be inconsistent with the longstanding principles of the McCarran-Ferguson Act that the regulation and oversight of this industry is to be left to the States." (see Congressional Record, December 9, 1980, p. 15856.)

Senator Hatch also commented on the insurance issue during the same debate, and we agree with his views. He said: (Congressional Record, December 9, 1980, p. 15856.)

> Extension of title VIII to property insurance would wreak havoc on the insurance business - not because insurers commonly engage in discrimination, but because HUD interprets title VIII as prohibiting practices that are purportedly discriminatory in their effect. If title VIII is extended to property insurance, insurers might be forced to underwrite unsound risks to avoid the wrath of overzealous HUD officials armed with oversimplified statistics.

INSURANCE PROVISIONS OF S. 558 WILL RESULT IN THE ESTABLISHMENG OF A DUAL REGULATORY SYSTEM IN VIOLATION OF THE PRINCIPLES OF THE MCCARRAN ACT

If S. 558 is enacted, serious problems would occur in the current regulatory structure of the property and casualty insurance industry. In its present form, S. 558, by adding the insurance business as a suspect industry under the Fair Housing Act, would subject property insurers throughout the country to federal as well as state regulation with respect to alleged discriminatory practices in the marketing of dwelling insurance.

NAII firmly believes that such a dual regulatory scheme directly contravenes the well established legal principles governing regulation of the insurance industry as embodied in the McCarran Act.

Under Section 2(b) of in the McCarran Act, the States have been authorized to regulate and tax insurers without federal interference unless there has been or until there is Congressional action specifically relating to insurance. Similarly, there is no indication in the McCarran Act that Congress had contemplated that in future years federal legislation on unrelated subjects only tangentially related to insurance could become the pretext for a duplicative layer of regulation over the insurance industry to be administered by a federal agency. Rather, it would appear that where state law already regulates the insurance industry, federal legislation cannot extend, contradict or overrule state law in the regulated area, unless Congress passes an Act which specifically, and not indirectly, or as a mere afterthought, addresses the business of insurance.

DISCRIMINATORY PRACTICES ARE PROHIBITED BY THE STATES

The Insurance Codes in at least 42 states either specifically prohibit discriminatory business practices in the marketing of property and casualty insurance or grant the Insurance Commissioner ample authority by which to investigate and eradicate, if necessary, any suspected unfair or deceptive trade practice of an insurance company operating within the state. Many of the Unfair Trade Practice Acts in these states proscribe "any unfair discrimination between individuals or risks of the same class or of essentially the same hazard and expense element." Some of these anti-discrimination provisions expressly designate "race, color, religion or national origin" as a prohibited basis for risk selection or underwriting purposes. A number of State Unfair Trade Practice Acts, although not having a specific anti-discrimination prohibition applicable to property or casualty lines of insurance, do have omnibus provisions empowering the Insurance Commissioner, after hearing, to report to the State Attorney General for prosecution any unfair method of competition or unfair or deceptive act or practice undefined but violative nonetheless of the Unfair Trade Practice Act.

STATES ARE CONSIDERING FURTHER ANTI-DISCRIMINATION MEASURES

In addition to the regulatory authority to control and eliminate discriminatory insurance marketing practices available to states through their present Unfair Trade Practice Acts, other state legislative approaches to the issue of unfair insurance marketing practices have been considered in many states.

Two model legislative measures have been adopted by the National Association of Insurance Commissioners (NAIC). The first measure is a specific amendment to section 4(7) of the NAIC Model Unfair Trade Practices Act which would prohibit unfair discrimination in the marketing of dwelling or property insurance due to geographic location of risks or the age of the residential property being insured.

The second approach is a Property Insurance Declination, Termination and Disclosure Model Act which as model state legislation would regulate declinations or insurance rejections, cancellations, and refusals to renew residential policies of property insurance and require formal explanations to accompany notice of an underwriting decision on the part of an insurer. In addition, the NAIC Property Insurance Declination, Termination and Disclosure Model Act prohibits the declination or termination of a policy of residential property insurance if such action is "based upon the race, religion, nationality, ethnic group, age, sex, or marital status of the applicant or named insured." Other restricted grounds for a declination or termination would include the occupation or profession of the applicant or named insured, the age or location of the residence, and the past underwriting history attributable to the applicant or named insured.

In addition to providing technical assistance to the advisory group in the development of these anti-discrimination or "anti-redlining" measures, NAII has pledged its unequivocal support for their adoption. Our association has endorsed the propriety of anti-discrimination provisions in State Unfair Trade Practice Acts and similarly has advocated the strengthening of such anti-discrimination sanctions through the legislative enactment of the two model property insurance reform measures described above.

We believe the affirmative steps undertaken by the NAIC, the individual state legislatures and the insurance industry with regard to the issue of discrimination reflect not only the responsibility of the state regulatory system but also a continuing commitment to improve the efficiency of that regulatory system.

NO DEMONSTRATED NEED FOR FEDERAL LEGISLATION

There is no demonstrated need for Federal anti-discrimination remedies regarding the sale of property insurance. The statutory and administrative remedies are already available to a "discriminated" property insurance applicant or policyholder by reason of present general powers of the Commissioner's office and the State Unfair Trade Practice Acts. The "anti-redlining" amendment to the NAIC Model Unfair Trade Practices Act and the NAIC Property Insurance Declination, Termination and Disclosure Model Act promise even greater regulatory control by the states over discriminatory insurance marketing practices, if such were found to exist. NAII believes that the states, in accordance with the directive of the McCarran Act, have taken the initiative and are "regulating" the insurance industry in this area quite capably without federal intervention.

INSURANCE SUPERVISION IS NOT THE PROPER SUBJECT FOR FEDERAL CIVIL RIGHTS LEGISLATION

Apart from the legal objections already raised, however, NAII must express strong reservations with one of the objectives of the Fair Housing Amendments Act of 1987 that is, bringing the insurance industry under the umbrella of what literally may be described as a Civil Rights Act. To assume that property insurers conduct their business with the intent to discriminate against minorities or other segments of society would be simplistic reasoning at best. The primary responsibility of the property insurance underwriter is to evaluate specific characteristics of the property being insured.

Underwriting standards do not take into consideration an insurance applicant's nationality, skin color or religion. These factors do not inform the underwriter about the risk of loss.

Sound underwriting requires selectivity and, consequently, some risks will be rejected by reason of their hazardous nature and cannot be written in the competitive market. They are insured by State FAIR Plans established to underwrite such high risk properties. In effect, the entire property insurance industry shares in the exposure presented by the high risk property. There is no discriminatory motive of the insurance industry behind a property insurance applicant being placed in a FAIR Plan.

S. 558 would pose substantial hardship on a property insurance company which as a matter of sound business principle restricts its writing of "high risk" properties. The insurer, underwriting risks in good faith, could be accused of discriminating against the insurance applicant, when actually the condition of the property precluded it from being underwritten by a company outside the FAIR Plan.

CONCLUSION

NAII recognizes that property insurance has become even more essential to our country's citizens ability to obtain adequate housing. With the rest of the insurance industry in this country, we share the responsibility of keeping property insurance both available and affordable to all citizens. Discrimination in the marketing of hazard or dwelling insurance would obviously be unacceptable if found to exist, but we do not view S. 558 as the proper manner in which to safeguard insurance consumers. On the contrary, NAII urges Congress to avoid creating an overlapping and dual scheme of regulation over the insurance industry which would result if insurers were brought within the parameters of the Fair Housing Act. An excess in regulation can only guarantee greater expense to the American insurance consumer as well as to our insurance industry. We are certain that each state, through its Insurance Commissioner, has the power and is regulating and investigating any charges of discrimination that may arise within that jurisdiction.

Accordingly, NAII strongly recommends that Congress delete the insurance reference in Section 6 of S. 558. We specifically ask that S. 558 be amended to strike the words "AND INSURANCE" on page 6, lines 6 and 7; the words "AND INSURANCE" on page 6, lines 8 and 9; and the words "or against hazards to dwellings" on page 6, lines 25 and 26.

* underscoring added

National Council on the Handicapped
800 Independence Avenue, S.W.
Suite 814
Washington, D.C. 20591

202-267-3846 voice
202-267-3232 TDD

An Independent
Federal Agency

June 25, 1987

Senator Paul Simon, Chair
Senate Judiciary Committee
462 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Simon:

We are writing to you in regard to the leadership role of the Judiciary Committee regarding the application of Federal Fair Housing legislation to persons with disabilities. The recently proposed Kennedy/Specter substitute bill for S.558 introduces into the legislation a concept that has been a central element of the recommendations of the National Council on the Handicapped in regard to housing -- a requirement of accessibility in the future construction of multifamily rental housing.

As you are aware, the National Council on the Handicapped is an independent Federal agency comprised of 15 members appointed by the President and confirmed by the Senate. The Council is statutorily mandated to review all laws, programs, and policies of the Federal Government affecting persons with disabilities, and to make such recommendations as it deems necessary to the President, the Congress, the Secretary of the Department of Education, and certain other Executive agency officials.

The Council's members and staff are predominantly individuals with disabilities and parents of children with disabilities; consequently, the Council represents, to a large degree, the voice of the disability community within the Federal Government. Whereas many government agencies deal with issues and programs affecting people with disabilities, the National Council is the only Federal agency charged with addressing, analyzing, and making recommendations on issues of public policy which affect people with disabilities regardless of age, disability type, perceived employment potential, economic need, specific functional ability, status as a veteran, or other individual circumstance.

One particularly problematic area for persons with disabilities is housing. An acute lack of housing opportunities for persons with disabilities severely impedes the social integration and independence of Americans with disabilities. People with disabilities seeking appropriate housing often encounter blatant prejudice and exclusionary rules and practices. In other circumstances, they are excluded by the existence of physical barriers such as stairs, narrow doorways, and inaccessible revolving doors.

78-076 O - 88 - 32

In 1986, the National Council on the Handicapped issued Toward Independence, its statutorily mandated report to Congress and the President. In a letter of thanks to the Council for the report, President Reagan endorsed the goals of equal opportunity and full social participation in the report and applauded Toward Independence as "a comprehensive agenda for progress toward these goals." One of the primary topic areas addressed in the report was that of housing, and the Council made several legislative recommendations to promote equal access to housing opportunities for people with disabilities. One of the major proposals was to amend the Fair Housing Act to expand its coverage to include persons with disabilities. President Reagan had previously called for such an expansion of Fair Housing legislation to include persons with disabilities, and had noted an apparent Congressional consensus in favor of such an expansion of coverage (President Reagan, "Message to the Congress Transmitting Proposed Fair Housing Legislation," July 12, 1983, Presidential Documents, pp. 991-992). The Council is pleased to see that both the original version of S.558 and the substitute bill would add discrimination on the basis of handicap as a type of discrimination prohibited under the Fair Housing Act.

The Supreme Court of the United States has noted that discrimination against persons with disabilities is "most often the product, not of invidious animus, but rather of thoughtlessness and indifference -- of benign neglect" (Alexander v. Choate, 469 U.S. 287, 295 (1985)). The Court expressly recognized that a major way in which persons with disabilities are discriminated against is by "architectural barriers" (Id. at p. 297). Since at least 1980, advocacy groups of persons with disabilities have been asking the Congress and the Senate Judiciary Committee for clarification regarding the requirement of accessibility in new construction.

Such concerns have caused the Council to call for an adaptability standard to insure that accessibility features are built into new housing: "In the Council's view, equal housing opportunity laws should require the architectural accessibility of all housing constructed in the future that is subject to these laws. This ... requirement will involve some costs, but, according to studies, relatively small ones" (Toward Independence, Appendix, pp. F-27 - F-28). The Council has examined existing studies of the costs of making multifamily housing units adaptable and noted that such features amount to less than 1% of new housing costs for multifamily dwellings (Id. at pp. F-28 - F-29). Based upon the small proportion of adaptability costs compared to overall project costs, and the great benefits that result to society and individuals with disabilities by reducing dependency costs and increasing

opportunities for productivity and independence of persons with disabilities, the Council has recommended that accessibility be built into all construction that is subject to the Fair Housing Act (Id. at p. F-29).

The Council applauds the inclusion in the substitute bill of provisions that would begin to impose an accessibility requirement on the construction of new multifamily housing units. The Council believes that the construction of housing to meet the needs of persons who currently have disabilities and the growing population of elderly individuals who can benefit from accessibility is a critical legislative initiative, and an essential component of our Nation's Fair Housing requirements. We congratulate you on your involvement and leadership on these issues, and look forward to assisting the Committee with any additional information you may request regarding the Council's recommendations and its views concerning equal housing opportunities for individuals with disabilities.

Sincerely,

Sandra S. Parrino

Sandra S. Parrino
Chairperson

National League of Cities
1301 Pennsylvania Avenue NW
Washington, D.C.
20004
(202) 626-3000

Officers

President
Cathy Reynolds
Councilwoman at Large, Denver, Colorado

First Vice President
Pamela P. Plumb
Councilor, Portland, Maine

Second Vice President
Terry Goddard
Mayor, Phoenix, Arizona

Immediate Past President
Henry G. Cisneros
Mayor, San Antonio, Texas

Executive Director
Alan Beals

April 16, 1987

The Honorable Paul Simon
Chair, Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
462 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Simon:

Enclosed is the National League of Cities' statement for the record in support of the Fair Housing Amendments Act of 1987 (S. 558). We ask that this statement (which is being submitted on NLC's behalf by Mayor Richard Arrington of Birmingham, Alabama) be made a part of the record of the Constitution Subcommittee's recently completed hearings on fair housing.

The National League of Cities strongly supports prompt action on this long-overdue legislation and opposes efforts to weaken the legislation by watering down the bill's enforcement mechanisms or cutting back on its coverage.

Sincerely,

Alan Beals
Executive Director

Enclosure

cc: Members of the Judiciary Committee

Past Presidents: **Tom Bradley**, Mayor, Los Angeles, California • **Ferd L. Harrison**, Mayor, Scotland Neck, North Carolina • **William H. Hudnut, III**, Mayor, Indianapolis, Indiana • **George Latimer**, Mayor, St. Paul, Minnesota • **Henry W. Maier**, Mayor, Milwaukee, Wisconsin • **Jessie M. Rattley**, Mayor, Newport News, Virginia • **John P. Rousakis**, Mayor, Savannah, Georgia • **Charles Royer**, Mayor, Seattle, Washington • **George V. Voinovich**, Mayor, Cleveland, Ohio • **Directors**: **Sidney J. Barthelemy**, Mayor, New Orleans, Louisiana • **José G. Benavides**, Council Member, Sterling Heights, Michigan • **Richard L. Berkley**, Mayor, Kansas City, Missouri • **Maria A. Berriozabal**, Councilwoman, San Antonio, Texas • **Bob Bolen**, Mayor, Fort Worth, Texas • **Scott A. Burgess**, Executive Director, Alaska Municipal League • **Jon C. Burrell**, Executive Director, Maryland Municipal League • **Mary Davis**, Councilmember, Atlanta, Georgia • **Eugene Cox Dunwody**, Council President, Macon, Georgia • **Stacey A. Garner**, Mayor, Pulaski, Tennessee • **W. Wilson Goode**, Mayor, Philadelphia, Pennsylvania • **E. Arthur Gray**, Mayor, Port Jervis, New York • **Alec Hansen**, Executive Director, Montana League of Cities and Towns • **Marian Humes**, Alderman, Chicago, Illinois • **Karen Humphrey**, Councilmember, Fresno, California • **Stevan E. Jaffrey**, Executive Director, Vermont League of Cities and Towns • **Robert E. Johnson**, Executive Director, North Dakota League of Cities • **Joseph A. Leafe**, Mayor, Norfolk, Virginia • **Roland A. Luedtke**, Mayor, Lincoln, Nebraska • **Charles Lyons**, Chairman, Board of Selectmen, Arlington, Massachusetts • **Arthur E. Morris**, Mayor, Lancaster, Pennsylvania • **Bob Overstreet**, Councilmember, Everett, Washington • **Grace Peterson**, Mayor, Pierre, South Dakota • **Joy Picus**, Council Member, Los Angeles, California • **Dana G. Rinehart**, Mayor, Columbus, Ohio • **Steven C. Roberts**, Alderman, St. Louis, Missouri • **Joseph A. Sweat**, Executive Director, Tennessee Municipal League • **Dan D. Theobald**, Mayor, Shelbyville, Indiana • **James Weatherby**, Executive Director, Association of Idaho Cities • **Douglas B. Wright**, Mayor, Topeka, Kansas

Statement of

Richard Arrington
Mayor of Birmingham, Alabama

submitted on behalf of
National League of Cities
to the

Subcommittee on the Constitution
Committee on the Judiciary

I am Richard Arrington, Mayor of Birmingham, Alabama; I am a member of the National League of Cities' (NLC) Advisory Council and have served as Vice Chair of NLC's Transportation and Communications Committee. I am submitting this statement in support of fair housing legislation to the Subcommittee on the Constitution of the Senate Judiciary Committee on behalf of my city and the 16,000 other cities and towns which NLC represents through direct membership and membership in 49 affiliated state municipal leagues.

I appreciate this opportunity to present my and NLC's position in strong support of the Fair Housing Amendments Act of 1987 (S. 558), as introduced by Senator Kennedy on February 19 with 37 cosponsors. This long-overdue legislation is an extremely important bill for the nation's minorities and its cities and towns. It would amend Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act of 1968, codified at 42 U.S.C. 3601 et seq.) to assure effective protections against housing discrimination.

For individuals whose civil rights are not adequately protected by current law, the need for legislation to strengthen the Fair Housing Act of 1968 is clear-cut. Despite some progress towards providing equal access to housing since the 1968 enactment of the Fair Housing Act, the national goal of eliminating discriminatory housing practices is far from

realized. According to a recent survey by the U.S. Department of Housing and Urban Development (HUD), 48 percent of Black Americans encounter discrimination in seeking to buy a house and 72 percent in attempting to rent an apartment. For minorities -- especially low income minorities -- housing discrimination can mean limited access to educational and economic opportunities as well as limited access to housing, effectively denying full participation in the nation's economic and social system.

The bill is of great importance for the nation's cities and towns. As the Supreme Court made clear in a 1977 case, "(t)here can be no question about the importance" to a community of "promoting stable, racially integrated housing." Yet housing discrimination remains one of the principal causes of a wide range of problems facing cities, especially central cities. The inability to escape from the racial ghettos of our cities adds to the isolation and alienation felt by many of our citizens. And, as a result, for cities, the already formidable task of promoting the economically and racially integrated neighborhoods that are a principal goal of federal housing and community development programs becomes virtually impossible.

The interest of cities in protecting their residents from discriminatory housing practices was recognized by the Supreme Court in the landmark Gladstone Realtors v. Village of Bellwood ruling. In a 7 to 2 decision, the Court ruled that the Village of Bellwood, Illinois had standing under the Fair Housing Act to challenge racial steering practices in the community.

S. 558 would strengthen both the coverage of the Fair Housing Act of 1968 and its administrative enforcement mechanisms. It accomplishes this goal through reasonable and balanced amendments to existing law that merit the strong support of this Subcommittee. The issue has been thoroughly debated by Congress in the past, most notably by the 96th Congress in 1979 and 1980, and the legislation should be enacted into law without any further delay.

COVERAGE OF THE FAIR HOUSING ACT

NLC strongly supports section 6(c) of the bill which would amend section 805 of the Civil Rights Act of 1968 to make clear that racial redlining by mortgagors and discrimination by insurers and appraisers are prohibited by the Fair Housing Act. Particularly important for cities and towns are provisions of the bill explicitly outlawing the practice of redlining. This practice remains widespread and continues to be a major obstacle to the promotion of economically and racially balanced communities.

S. 558 expands coverage of the Act in two important ways. First, it extends coverage to handicapped persons, thereby assuring access to housing for the nation's disabled on the same terms as other members of society. Second, it prohibits discrimination on the basis of familial status, thereby assuring that persons with children have equal access to housing. A recent HUD survey shows that families with children are barred from 26 percent of the nation's rental units.

ENFORCEMENT PROCEDURES

The bill's new and strengthened enforcement procedures are the

heart of S. 558 and should be approved in their present form without further modification.

Under existing law, a victim of racial discrimination in the housing market must rely primarily on court litigation, with all its attendant delays and expenses, for relief. While a complainant may seek administrative relief through HUD, these enforcement procedures are toothless and therefore provide little or no meaningful protection.

HUD is empowered only to use informal conference, conciliation, and persuasion techniques, and to refer complaints to state and local fair housing agencies for further action. If these informal techniques do not work, HUD is powerless to do more, leaving the victims of discrimination on their own to expensive and time-consuming litigation. In the renting or buying of a unit of housing, time is of the essence: A prospective tenant or home-buyer cannot afford to spend two or more years in litigation unless he or she can obtain alternative temporary accommodations -- an unlikely event -- for the duration of the litigation and has the financial resources to pay for the litigation.

The inadequacy of HUD's enforcement powers are clear. Conciliation, without backup enforcement activity, can result in success in only the rarest of cases. As a result, despite the enactment of the Fair Housing Act nearly 20 years ago, there are nearly two million incidents of racial discrimination in the housing market each year according to HUD estimates.

Moreover, the judicial remedies provided by current law are deficient. Private litigation is generally too expensive and time-consuming for victims of housing discrimination, many of whom are low income persons. The Federal Government generally cannot intervene to pursue housing discrimination claims on behalf of victims of discrimination. The Department of Justice may bring suits only where it can establish a "pattern or practice" of discrimination, and not on behalf of individual victims of discrimination.

S. 558 would strengthen both the HUD Secretary's administrative authority to seek redress for violation of the Fair Housing Act, and its judicial remedies. It would establish an enforcement system that is effective and fair for all parties.

Section 8 of the bill would grant HUD two new enforcement mechanisms. First, HUD would have the administrative authority to pursue complaints brought to its attention by victims of discrimination or to initiate its own actions. It -- through a balanced and fair administrative process -- could act on these complaints by providing temporary relief, issuing cease and desist orders, and imposing penalties. Second, it could refer complaints to the U.S. Attorney General for litigation under proposed section 810(e) of the Civil Rights Act even in cases where no "pattern or practice" of discrimination exists.

A victim of discrimination would have a choice of remedies: Administrative relief from HUD under proposed sections 810 through 812 of the Civil Rights Act or litigation under proposed section 813. And, in an administrative proceeding

(or a judicial proceeding for enforcement of an administrative order), fees and court costs may be awarded to the prevailing party.

Finally, the Department of Justice would be authorized to bring suits on behalf of individual victims of discrimination under proposed section 814 of the Civil Rights Act, as well as in "pattern or practice" cases. The Attorney General could file suits on behalf of complainants referred by HUD, and also intervene in private suits.

The most critical provisions of the bill are those relating to HUD's authority to conduct administrative proceedings to resolve claims of housing discrimination. We all know that housing discrimination will not be ended through a piecemeal attack on the problem in the form of lawsuits brought by individuals. The administrative enforcement procedures authorized by the bill allow for the resolution of disputes by administrative law judges in an efficient and cost-effective manner and are patterned after those used by 28 federal departments and agencies as well as numerous state and local agencies. They are fair and reasonable -- they include numerous procedural safeguards for both the complainant and the respondent and are subject to judicial review -- and should be implemented as soon as possible.

We would like to point out that this stronger enforcement role for HUD does not mean that state and local governments are relieved of an enforcement role in this area. Rather, under proposed section 810(f) of the Civil Rights Act, a state or local agency may be certified by HUD to enforce the federal

fair housing laws through its own comparable procedures. In our view, many local governments will assume this responsibility and establish vigorous enforcement mechanisms at the local level, greatly reducing the Federal Government's administrative burdens.

CONCLUSION

In closing, I wish to reiterate the importance of this bill to the nation's cities and towns. Housing discrimination remains one of our gravest urban and human problems. NLC policy "opposes all housing discrimination that denies people equal access to housing opportunities. . . . NLC supports a national policy favoring the promotion and preservation of housing markets -- and neighborhoods -- that equally attract hoemseekers from all racial groups and do so by means that expand, not limit, options for individuals." We urge favorable and immediate Subcommittee action on S. 558, which is essential to the effective enforcement of the Fair Housing Act.

STATEMENT BY THE NEW YORK CITY COMMISSION ON HUMAN RIGHTS IN SUPPORT OF THE FAIR HOUSING AMENDMENTS ACT OF 1987, S. 558

SUBMITTED TO THE SUBCOMMITTEE ON THE CONSTITUTION OF THE SENATE COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE
JUNE 5, 1987

Prepared by: Joan M. Thompson, Director of Fair Housing
William A. Herbert, Staff Attorney
New York City Commission on Human Rights
52 Duane Street
New York, New York 10007

The New York City Commission on Human Rights submits this statement in support of the Fair Housing Amendments Act of 1987. The Commission on Human Rights is the administrative agency mandated to receive, investigate and prosecute complaints of housing discrimination in the City of New York.

The New York City Administrative Code prohibits housing discrimination based on a person's race, creed, color, sex, national origin, marital status, sexual orientation, disability, lawful occupation, age or because a child resides or may reside with that person.

The Commission believes that the Fair Housing Amendments Act of 1987 represents the most significant federal fair housing legislation since the enactment of the federal Fair Housing Act in 1968. The proposed amendments, if enacted, will substantially improve the federal Fair Housing Act and increase the role of the U.S. Department of Housing and Urban Development (H.U.D.) in fair housing enforcement.

1. Federal Administrative Process:

The bill will create for the first time a federal administrative forum, within H.U.D., where complaints of housing discrimination will be heard. The administrative process proposed in the bill is quite similar to the procedures utilized by the Commission on Human Rights. Our experience demonstrates that administrative agencies do perform an essential role in eradicating housing discrimination. Administrative agencies provide victims of housing discrimination with an effective and inexpensive forum to seek relief.

The proposed administrative process should not be seen as a distant second cousin to federal court litigation. Recently, the Commission on Human Rights awarded over $18,000.00 in compensatory damages to an Hispanic physician's assistant who was denied an apartment by a Queens, New York landlord.

In supporting the creation of a federal administrative process we believe that it is incumbent upon the Congress to insure that H.U.D. will be provided with sufficient funding and trained staff to insure its' effectiveness.

2. Expansion of Protected Groups:

The New York City Commission on Human Rights welcomes the proposed expansion of the Fair Housing Act to prohibit housing discrimination against individuals with children and people who are handicapped. In 1983, the Commission held public hearings regarding discrimination against persons with children. The testimony demonstrated that persons with children are regularly denied housing due to their familial status. In June, 1985, in response to our hearings, the New York City Council enacted legislation which prohibits discrimination against persons with children.

3. Attorneys' Fees and Punitive Damages:

The New York City Commission on Human Rights also strongly supports the proposed amendments regarding attorneys' fees and punitive damages. Presently, attorneys' fees can be awarded under the Fair Housing Act only when a plaintiff is found by the court to be financially unable to assume their own fees. Unfortunately, the present provision does not provide a sufficient incentive for private attorneys to agree to represent victims of housing discrimination in federal court. We believe the proposed attorneys' fees provision will encourage more private attorneys to represent victims of housing

discrimination in federal court. In addition, we vigorously support the proposal to permit both H.U.D. and the federal courts to award to victims of housing discrimination appropriate amounts of punitive damages under the Fair Housing Act. Presently, the statute permits the awarding of a maximum of $1,000.00 in punitive damages which is not sufficient to compensate victims or deter egregious conduct such as: blatant racial discrimination and sexual harassment in housing.

For these reasons, the New York City Commission on Human Rights fervently supports the Fair Housing Amendments Act of 1987. We expect that the enactment of this legislation will insure a more aggressive role by the federal government in the enforcement of fair housing laws.

PARALYZED VETERANS
OF AMERICA

STATEMENT FOR THE RECORD

BY

DAVID M. CAPOZZI, ASSOCIATE ADVOCACY DIRECTOR

PARALYZED VETERANS OF AMERICA

ON S.558

THE FAIR HOUSING AMENDMENTS ACT OF 1987

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

MARCH 31, 1987

801 Eighteenth Street, N.W., Washington, D.C. 20006 (202) USA-1300

A Chartered by the Congress of the United States

Mr. Chairman and Members of the Subcommittee, on behalf of the members of the Paralyzed Veterans of America (PVA), I would like to thank you for conducting this hearing on S.558, the "Fair Housing Amendments Act of 1987". We appreciate the opportunity to provide you this written statement for the record expressing both our support and our concerns relative to this important piece of legislation. Since PVA is an organization comprised totally of catastrophically disabled veterans, we will limit our discussion to those sections of the bill which propose to extend nondiscriminatory coverage to those persons with disabilities.

It should be noted at the outset that PVA is extremely gratified that S.558 seeks to extend this much needed protection to America's citizens with disabilities. This coverage has been needed for many years but it becomes even more imperative now when the federal government is cutting back drastically on its federally funded housing programs. We do have some reservation with the language of the bill which requires the prospective renter or purchaser of real estate with a disability to bear the cost of making all the necessary modifications to a piece of property. This provision paves the way for necessary alterations to assure access, at least for those tenants who can afford to pay for such modifications. It is important that Congressional intent regarding this provision be clarified to insure that:

1) To the extent that a tenant may have to assume any costs for modifications, those costs should be limited to the premises or dwelling unit actually occupied by the tenant and should not be

interpreted to include necessary modifications to space shared in common with other tenants.

2) Nothing in this section may be read to restrict the ability of landlords and tenants to negotiate arrangements for payments for modifications or to access outside resources for such payments. In addition, this section must not function as a deterrent for the current and growing practice to incorporate retrofit programs into funding priorities under various local, state, and federal housing and social service programs.

The Paralyzed Veterans of America is a congressionally chartered veterans' service organization comprised of more than 12,000 veteran members. All of our members have incurred a spinal cord injury or dysfunction either as a direct result of their service to our country or from an accident or disease subsequent to their military service. The majority of our membership must rely upon the use of wheelchairs for their personal mobility.

Since its founding in 1947, PVA has been actively involved in issues of accessibility at the local, state, and national levels of government. The reason for this stems from the fact that as veterans with spinal cord injury returned home from World War II, they found themselves confronted with a serious dilemma. With the advent of new antibiotics and improved medical procedures, these veterans found they could live longer and healthier than originally anticipated, but they also found a society unable or unknowing about accommodating their needs.

Mr. Robert Moss, one of PVA's founding members, succinctly describes the situation confronting spinal cord injured veterans in the late 1940's. "We were faced with a group of young men with a physical handicap that had virtually not been survivable prior to that time...there was no way of coping with society as society was then constituted. There were no programs for survival, there were no care programs, and there was certainly no such thing as the elimination of architectural barriers -- there was no legislation for it." These men were honored heroes, yet their goal of returning to society as productive members was blocked.

Forty years ago, we were faced with assumptions which limited the abilities and opportunities for individuals with disabilities. Public officials charged with making policy decisions as to where accessible housing would be provided, if at all, premised their decisions on the attitude that individuals with disabilities were so different that they mandated different and separate treatment. Thus began a period of "benign neglect" coupled with sporadic, often unenlightened efforts and blatant discrimination.

Benign neglect, unlike overt acts of discrimination, stems from a misplaced kindness and gentleness toward individuals with disabilities. This attitude, however, leaves the real needs of people with disabilities unattended to. Benign neglect, by definition, does not recognize the vast potential which disabled people possess and often leads to well meaning but counter productive government policies. An example of such a policy is the development of segregated housing for disabled persons. While segregated housing does provide affordable housing opportunities it also perpetuates the

isolation of persons with disabilities and frustrates their attempts at gaining independence and living in the mainstream of American life.

Congress recognized the fact that handicapped persons were being discriminated against in a number of ways when it enacted Section 504 of the Rehabilitation Act of 1973, as amended. That section provides that "no otherwise qualified handicapped individual...shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." This prohibition against discrimination extends to those housing and other programs which are conducted by or assisted with Federal money. This will be true only when HUD promulgates an effective section 504 regulation.

Section 504 differs conceptually from other civil rights laws. The premise of civil rights laws is that there are no inherent differences or inequalities between the general public and the persons protected by these statutes and, therefore, there should be no differential treatment in the administration of Federal programs. The concept of Section 504, on the other hand, is far more complex. A program may not "afford an opportunity...that is not equal to that afforded others or provide...an aid, benefit, or service that is not as effective as that provided others."

Compared to the coverage of Title VIII of the Civil Rights Act of 1968, Section 504 is quite limited. Its impact is felt only in those housing programs which are Federally conducted or assisted. The coverage of Title VIII on the other hand, is extremely broad, applying to almost all types of

housing with the exception of certain private, single family dwellings, and facilities owned or operated by religious groups and private clubs. The importance of this distinction must be underscored. Major housing programs developed for people with disabilities which are conducted or assisted by the Federal Government can generally be described as "segregated housing." That is, persons with handicapping conditions must live with other handicapped persons if they wish to take advantage of government supported housing. Administration efforts would remove even this housing program and establish it under a Voucher Program. While vouchers can provide money to rent housing, they do not automatically produce accessible housing and nondiscriminatory treatment. By extending Title VIII coverage to handicapped persons, this Committee would effectively provide unlimited housing options to disabled persons. No longer would the choice be limited to institutional care or segregated housing.

The need for a prohibition against discrimination is also important for another reason. It may perhaps come as no surprise that disabled Americans are much poorer than non-disabled Americans. A recent nationwide poll of disabled Americans conducted by the survey firm of Lou Harris and Associates, indicated that approximately 27 million individuals between the ages of sixteen and sixty-four who are not in institutions, are disabled. And, based upon 1984 statistics 50% of all disabled persons have household incomes of $15,000 or less. Among non-disabled Americans, only 25% have household incomes in this bracket. As a result of their low income, many disabled citizens are precluded from obtaining the American dream - owning one's own home. Therefore, handicapped persons are, for the most part, renters or potential renters.

Mr. Chairman, as you are aware, federally funded and assisted low income housing projects are required by law to provide a percentage of all new construction to be made available for disabled persons. However, given the small percentage of housing units required to be accessible combined with uneven or little enforcement of this requirement the end result is few accessible housing units and long waiting lists for persons who have a real need for these units. While able-bodied, low income tenants can often move right into these housing projects, waiting lists of several years are not uncommon for the few accessible units.

To add to the accessible housing shortage, in approximately one-third of the states, landlords are free, if not funded by federal funds, to build new housing projects designed so that they are totally inaccessible to a prospective tenant with a disability. In addition, in nearly every state, landlord's and owners of real property are free to discriminate against handicapped persons who seek to rent or purchase property. Therefore, the only recourse available to these individuals is to retreat to the limited protection of housing provided by federally funded housing programs, and as mentioned earlier even these programs are being proposed to be cut back drastically.

Mr. Chairman, if this Subcommittee is truly dedicated to the proposition that all Americans should be afforded an equal opportunity to fail or to succeed in their life endeavors, then extending Title VIII of the Fair Housing Act of 1968 to include individuals with disabilities as a protected class will be a significant first step toward reaching this goal.

It must be understood that persons with disabilities face not only the discrimination of benign neglect but they also encounter overt discriminatory practices both in the public and private housing sectors. The following are examples of incidents of housing discrimination as reported to us by our PVA Chapters located throughout the United States.

The Eastern Paralyzed Veterans Association (EPVA), one of our larger Chapters, located in New York City reports that:

1. One of the most common types of discrimination facing mobility impaired individuals is a refusal by landlords to allow the construction of a ramp to an entrance way of the landlord's building. This occurs even when the disabled person is willing to make and pay for the modification themselves even though the ramp could be used by other potential or existing tenants. Elderly people with shopping carts and young parents with strollers are among those who reap the benefits of a ramp.

2. Another common area of discrimination occurs when an individual with a disability requests the permission of a landlord to make alterations to a bathroom or kitchen and is refused.

3. Related to the previous example, are situations where a landlord has allowed a modification to be performed but then requires that the unit be returned to its previously inaccessible state. Landlords request that this be done even though such modified units

can often attract long term tenants and higher rents or purchase prices.

4. Private landlords will often require that the disabled individual deposit money in an escrow account to protect against damage to the property or to cover anticipated liability.

5. Oftentimes, a landlord refuses to arrange for handicapped parking close to the building or make other reasonable accommodations that cost a landlord very little effort.

6. In larger multi-unit housing where the main entrance and living apartments are accessible, common areas such as laundry and meeting rooms are often not. This furthers the isolation and dependence of disabled persons.

7. Landlords are also reluctant to rent to two or more physically disabled individuals who wish to share an apartment to lessen the financial burden. These individuals often choose this living arrangement in order that they might share an attendant who can assist them in their activities of daily living.

Other examples of housing problems or discriminatory practices noted by other PVA Chapters and disabled individuals include:

8. In a 1979 survey of accessible apartments in Albuquerque, New Mexico, 22,000 apartments were inspected by our Zia Chapter and only 5 were completely accessible to disabled persons. All five

units were one bedroom apartments. Compounding the problem, fewer than 6% of the disabled residents in the county could afford to purchase a house as an option. This situation leaves few options for families who have disabled family members.

9. In Omaha, Nebraska, our Great Plains PVA Chapter operates two special housing projects with 48 accessible units. Forty of the units are occupied by non-veterans, many of whom do not qualify for VA or FHA loans, or other government housing programs. Because of a tremendous need for accessible housing in Omaha, and extremely long waiting lists, which contain almost twice the number of applicants as there are units available, the Great Plains Chapter is seeking funding for a third project.

10. In Memphis, Tennessee, our Mid-South PVA Chapter reports that of the 50 apartment complexes identified as being available for handicapped, elderly and low income families, over 5,000 eligible tenants are on waiting lists. Some are currently living in substandard conditions and inaccessible units.

11. In Ann Arbor, Michigan, an elderly, disabled woman who was able to care for herself was prevented from moving into a segregated housing complex for the elderly simply because she could not manipulate the locks and open the heavy lobby door.

12. Also in Ann Arbor, students who use wheelchairs were precluded from living in new student housing built with HUD low interest loans.

All of the more than five hundred housing units are town houses with bedrooms and baths located on the second floor.

13. A. prospective tenant, a mother who walks with crutches, applied for a HUD Section 8 Low Income Housing project. She was denied an additional handrail which would allow her to use the stairs and was forced to put her name on a waiting list for the one accessible two bedroom unit. Out of more than five hundred units, only two were made accessible and one was a two bedroom unit, while the majority of the regular units consisted of two and three bedroom units. Management informed the prospective tenant that no modifications were allowed and that the adjacent HUD Section 202 Elderly Housing Project had accessible units but could not accept children. Three years later the woman was contacted by the management to ascertain whether she wanted her name to remain on the list.

Mr. Chairman, these are but a few of the many examples of the frustration and discrimination that disabled individuals face. Each attempt at achieving an integrated life style is thwarted by myths, misconceptions, preconceived ideas and ineffective public policy.

Including disabled persons among the protected classes of Title VIII through the Fair Housing Amendments Act of 1987 will provide both a powerful statement against the segregationist policies fostered by "benign neglect" and a proper defense against the blatant discrimination experienced by citizens with disabilities. Individuals with disabilities are asking only for a chance, an opportunity to succeed or fail on their own.

PVA wishes to thank the Subcommittee for the opportunity to present our views and comments upon the bill presently under consideration. We look forward to working with the Committees in Congress to assure that the goals of S.558 are reached.

ZIA CHAPTER
PARALYZED VETERANS
OF AMERICA, INC.
Chartered by the Congress
of the United States

Senator Paul Simon
U S Senate
Washington, DC
20510

July 7, 1987

Dear Senator Simon:

We understand the Senate Judiciary Committee will neet this week to consider the Kennedy-Specter substitute for the Fair Housing Amendments Act, S-588.

This substitute clearifies and simplifies the access requirements for housing which allows greater ease of use for a wider range of people. An adaptable unit that a handicapped person can use benifits persons young or old, using walkers, crutches, canes, short and/or heavy people and mothers carrying children.
Man-made designing for the public must take into account the whole spectrum of the public in all their sizes, shapes and limitations. We hope you will support the substitute.

Thank You,

Ralph Markward

Ralph Markward,
Executive Director, Zia PVA

833 Gibson Blvd. S.E., Albuquerque, New Mexico 87102
Telephone (505) 247-4381/82

STATEMENT

OF

ALEXANDER POLIKOFF

Mr. Chairman and Members of the Subcommittee:

I am Alexander Polikoff, Executive Director of Business and Professional People for the Public Interest, a public interest law center in Chicago, Illinois. I am also counsel for the South Suburban Housing Center in South Suburban Housing Center v. Greater South Suburban Board of Realtors and National Association of Realtors, No. 83 C 8149, pending in the federal district court in Chicago.

I appreciate the opportunity to comment on statements made to the Subcommittee on behalf of the National Association of Realtors (by Robert Butters, Statement of March 31, 1987) and the Illinois Association of Realtors (by Randall Reynolds, statement of April 2, 1987).

The statements of the Realtors assert that confusion exists concerning the meaning of the Fair Housing Law which demands legislative resolution; and they imply that the South Suburban litigation is only one of many lawsuits against Realtors growing out of this alleged confusion.

The South Suburban suit involves three single family homes in Park Forest, Illinois. The homes had been acquired by the Village of Park Forest from the Veterans Administration (after VA foreclosure), and were then rehabilitated and offered for sale under an affirmative marketing plan. Suit was filed when the Realtors' multiple listing service declined the listings.

The unique nature of the case, and the inaccuracy of the implication that it represents only the tip of a litigation iceberg, may be gathered from the following observations of the then General Counsel of HUD, John J. Knapp, in a letter to William D. North of the Realtors:

> "The only case of which I am aware that involved brokers' refusal to 'cooperate' with affirmative marketing efforts is quite unique. The South Suburban Housing Center, as owner of three homes in an integrated or predominantly black area, entered into a listing agreement with a broker which obligated the latter to advertise the homes in newspapers with a predominantly white circulation. The agreement would further obligate the broker, in its dealing with all clients, to assure that each client 'is informed about available dwellings in neighborhoods in which persons of the client's race are not likely to be attracted without special outreach efforts.' The agreement did not purport to limit the availability of the three subject homes to white prospects; in fact, it obligated the broker to 'attract minority and majority group persons' to the homes....
>
> The broker accepted the listing agreement with the foregoing 'affirmative marketing' provisions, but the local Board of Realtors refused to include information about the homes in its multiple listing book in the absence of an indemnification by the Center against any Fair Housing Act liability which the Board might incur arising out of the affirmative marketing obligations under the agreement. The Center, as owner of the homes, thereupon sued the Board on various claims, including a claim that the Board had frustrated the owner's efforts to make the homes available to persons of all races, in violation of Section 804(a). The action is pending. South Suburban Housing Center v. Greater South Suburban Board of Realtors, No. 83-C-8149 (N.D. Ill.).
>
> It is difficult for me to draw from this suit by an owner against a Board for failure to accept a listing agreement signed by a broker, a realistic prospect that actions will be brought by third-party fair housing groups or communities against realtors who conduct their dealings with customers on a color blind basis. It is imposible me to conceive how anyone can impose liability on a broker for making dwellings available regardless of race. It is even more difficult to perceive how testing, which in this case presumably would disclose an absence of differential treatment, would provide the basis for such an action. If any such actions actually have been initiated, or even threatened, I assure you that I would be interested to learn of them." (Letter dated August 6, 1985, from John J. Knapp, General Counsel of HUD, to William D. North, Senior Vice President and General Counsel, National Association of Realtors, p. 21.)

The suggestion that there is great confusion about the Fair Housing Law is likewise unfounded. In a letter to the Honorable Stewart B. McKinney of the House of Representatives, HUD Secretary Pierce said:

"...[I]f there is a 'fundamental dispute' anywhere regarding 'what fair housing means,' it does not exist within the Federal Government. Any attempt to characterize HUD's affirmative marketing requirements with racial quotas is clearly off the mark. HUD has long made it clear that mere projections of anticipated occupancy cannot under any circumstances be used as a 'quota' in the tenant selection process (see explicit instructions for Affirmative Fair Housing Marketing Plans). HUD's position to this exact effect with regard to Starrett City, for example, clearly appears in the record of the private lawsuit involving that project....

"In stating support of programs of some communities to which the label 'integration maintenance' had been applied, I explicitly differentiated those programs from quotas. In fact, I characterized such programs as efforts opposed to racial steering." (Letter dated June 3, 1985, from Samuel R. Pierce, Jr., Secretary of HUD, to Honorable Stewart B. McKinney, pp. 3-4, emphasis added.)

And in a letter to Mr. North of the Realtors, Assistant Attorney General Bradford Reynolds said:

"Thank you for your letter of January 23, 1985 expressing your concerns about various affirmative marketing programs and the conflict which you see between those programs and the Fair Housing Act, Title VIII of The civil Rights Act of 1968, 42 U.S.C. 3601 et seq.

It is the responsibility of the Civil Rights Division of the Department of Justice to take judicial action to enforce the Fair Housing Act when there is a pattern or practice of discrimination in violation of the Act or when a group of persons has been denied rights guaranteed by the Act. In determining whether a violation has occurred which warrants judicial action by the Department of Justice, The Civil Rights Division examines the actual practices specific to each case. Such individual consideration is particularly essential with respect to practices which may come within the scope of the terms 'affirmative marketing' or 'integration maintenance' since those terms can mean very different things to different people.

Practices which do not limit housing opportunities but which are designed to provide complete information to all homeseekers on the full range of housing opportunities available to them are fully consistent with the purpose of the Fair Housing Act. Such practices represent the type of affirmative outreach program encouraged by the Act in order to expand housing opportunities and, of course, would not be the subject of Justice Department litigation. On the other hand, where the evidence shows that

> the practices in question intentionally limit or exclude persons from housing opportunities because of race, color, sex, religion, or national origin, in violation of the Fair Housing Act, we have commenced litigation in order to enforce the Act. Our enforcement decisions in such cases are not affected by claims that such discrimination is necessary in order to maintain integration within a housing development or neighborhood." (Letter dated February 25, 1985, from Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division, to Mr. William D. North, Senior Vice President and

Any confusion -- for example, of "integration maintenance" with quotas or steering -- thus appears to exist in the minds of the Realtors, not within the Federal Government. Certainly the two agencies charged by Congress with administration and enforcement of Title VIII do not seem to be confused about the reach or application of the law. One may surmise that it is the dialogue, not the law, that requires clarification.

To help provide that clarification, I prepared a paper for the United States Commission on Civil Rights, a copy of which I attach hereto.

Thank you for the opportunity to present this statement.

"INTEGRATION MAINTENANCE"
(Governmental Interposition In The Housing Market To Induce Racial Proportionality)

Prepared By

William Simpson Juanita H. Simpson Peter L. Flemister

Copyright 1987

Honored Committee Members:

About a month ago, my wife and I received a nighttime call from our youngest daughter - who is a 1st Lt. in the Air Force. She was calling to let us know that she was "alright". She knew the media was carrying news about the crash of a plane from her base, and since no names of the dead were being given, she just wanted to reassure her parents.

Later that night, our son called to say he had seen the TV reports of the crash, had checked the air base, and he too reassured us that our daughter was not a victim. My wife and I then called our oldest daughter, and informed her of the circumstances, in case she happened to catch a story of the crash, and it listed no names of fatalities.

We relate this story to you, members of the committee, because it embody's a germinal impetus for why we have been opposing programs to "maintain integration" in housing for the past 15 years; from the local to the federal level. The networking of our family in that crash incident just served to reinforce one of the most effective of criticisms of the idea of limiting the number of Black families in buildings, neighborhoods, and communities, in order to affect some governmentally imposed balance of the population mix (integration maintenance).

We know that integration maintenance programs in housing would seek to prevent our family, which networked so splendidly in the mentioned incident, from living in adjacent houses, or occupying all the apartments in a building, because such living patterns would conflict with integration maintenance proponents' estimate of how many Black families ought to be on a block; an estimate which pays no attention to familial ties.

The advancement and implementation of programs and policies, by local governments, HUD, and local housing centers throughout the country to "maintain integration", "manage integration", "maintain racial diversity", "prevent resegregation", etc., has given rise to a broad range of questions concerning the moral and legal ramifications of the deliberate managing of the buying, selling, and renting of housing for the purpose of controlling the percentage racial makeup of building, neighborhoods, and communities. We have actively monitored the issue for more than 15 years. The declarations and conclusions which are respectfully submitted to you in this testimony are the results of that protracted attention to the subject.

The seed for the growth of integration maintenance programs, whether admitted or not, is the trepidation over the presence of Black families in communities. It is an undeniable reality that white families will move out of, or decline to move into, areas that have an uncomfortable percent of Black residents. Operating with this "given", muncipal officials have been devising a multitude of housing plans to achieve a common goal; that is to limit the number of Black families in designated areas, so as to encourage white families to stay, or to move in. Such activity has, in our considered opinion, potentially devastating consequences for Black people, and is both morally and legally indefensible.

We think that the moral deficiencies of housing integration maintenance programs are of particular importance because the programs take as their justifying foundations maxims that persistently identify Black people as a danger to the health and welfare of communities. It makes no difference, the moral, financial, and intellectual attributes of individual Blacks, only that they possess the criterion for housing manipulation, being Black. The great American fidelity to equal opportunity for all Americans to live where they choose and can afford, falls victim to a most un-American denial to Black families, as a direct result of integration maintenance programs.

It was not long ago, gentlemen, that the Congress, in some of its finest hours, legislated housing laws to end the discrimination in housing that had tainted our democracy for decades. Now local, federal state, and legislators are being pressed to pass ordinances and allow amendments to existing housing laws that would governments to allocate, proportion, balance the racial makeup of communities.

The irony is that so many of the proponents of these integration maintenance programs were yesterday's civil rights fighters, but

are today's promoters of policies that are a backward step leaving us but a breath away from where we started breaking discriminatory housing practices.

In some ways we are reminded of the musings of the great Black slavery fighter, Frederick Douglass, when he pondered that state of affairs which saw the paradox: Great white abolitionists, such as William Lloyd Garrison, were willing to put their lives on the line, literally, in a crusade against slavery. Yet, as Douglass lamented, they could not also consider him and other Blacks as equals to be hired, or to live in unfettered freedom where they so chose. Mr. Douglass had to reluctantly break away from people so fine in many ways, in order to exercise his own intellectuality, manhood, and citizenship. Our concern with the well-intentioned attempts to manipulate population to "maintain integration" contains much of the paradox that drove Mr. Douglass to go his separate way from people whose general moral tendencies he so admired.

The untrumpeted, all-pervasive maxim prevails: Black people are the spoilers of communities; no social unit can be worthwhile if it is not limited in the number of Blacks it contains. Inevitably, gentlemen, this means that a pall of inferiority is cast over any social units deemed to be "overrepresented with Blacks; including churches, schools, communities, businesses, and unspeakably, even the Black family itself. Proponents of racial management of housing to maintain integration insistently deny this to be their motive, but we say their motives are not in question. The very logic of their spoken and written justifications for managing housing racially implies Black people as spoilers of communities, as threats to the general welfare, and a group that must be kept separated and divided from ourselves for the good of communities, neighborhoods, and buildings. And so integration maintenance expects us not to bring our families to live next door, or in the same building.

As adversaries of integration maintenance we take unwavering exception to this casting of Black families in the role of spoilers of communities. Having lived in suburban areas for 23 years, and knowing hundreds of Black families living in the same communities, we know that there is no justifiable basis in fact for housing programs predicated on such a designation. Further, we resent individuals who are not our superiors in any category creating blanket policies intended to limit our freedom of choice to live where or next to whomever we choose, so long as we can afford it;

whether our choice be a community of few whites, or few Blacks, or many whites, or many Black families.

But beyond that, in this day when Black people are exhorted to a greater awareness of the state of the Black family, we deplore the creation of governmental housing programs that do nothing if not thoroughly disregard the very existence of the need for family cohesion. If you will permit us, gentlemen, you no doubt have families of which you are justly proud. Can any of you think of the circumstances in which you would ask family members to not move into your locale, just because people might move out? Even if you knew that some one might move out if members of your family moved into the house next to you, what would your response be to a suggestion, "Senator, maybe if we spread your family around..."?

The question, as we have just put it, may seem grotesque to you. Yet, if ones gives it a little thought, that is just the type of grotesqueness that is the logical ramification of integration maintenance housing programs. A Black family, living on a block, or in a building, in an area that has in effect managed integration housing programs, is by policy, law, implication, or all three not expected to welcome its very own members as residents of the area. Reflect, for a moment, on the consequences for our democratic society of programs that would treat citizens in that fashion. The Jones family (Black) lives in community X, but attends a Black church in the neighboring town, or maybe even back in the community from which the family moved to community X. The Jones's sing the praises of their new community; it's schools, it's trees, it's peace and quiet. Some of their chruch friends express more than a passing interest in moving to that community also; as does the Jones's parents, on both sides. There might even be a couple of vacant homes adjacent or close to the Jones's. But community X is interested in managing the population to maintain integration. And the community now has about an 18% Black population, and more than half of the prospects being shown homes in the community are Black families. What kinds of questions arise from such a situation?

Perhaps initially it should be asked, Senators, why there should even be an issue of whether more Black families are considering moving into the same community as their church friend? In their

case, we haven't even looked into any of the standard criteria that are usually used to measure whether Americans qualify to move into communities; economic ability and the like. Instead, the overriding criterion for integration maintenance is, "...is the family Black...".

The denigrating character of such programs is stunning. They exist for the sole purpose of seeing to it that Black families are scattered throughout communities, irrespective of family ties, friendships, and all standard supportive relationships. Almost reprehensible is the prospect that our Black Jones family in community X should be expected to deprive itself of the joy of having family and friends move into the community, onto the Jones's block, because some integration maintenance planners, with no apparent recognition of the importance of, or even existence of such ties, enact programs to limit Black families.

What is this to mean for the formation of traditional Black social units; the Black church, for example? What is implied by the maxim that more than minimally Black is undesirable? We say that for Black people to assent to such a proposition is to voluntarily consent to group and self-annihilation. How is it possible to assent to the thesis that majority, or all-Black is not desirable, and honor one's own Black family? It is no difficult assertion to say integration maintenance is doomed to failure. No group is going prostrate itself to the point of denying it's familial connections.

But as we have raised these questions of attempts by governments, and others, to manipulate Black families for the sake of maintaining integration, it has become unmistakably clear that the proponents of managed integration little conceive of the disdain they hold for the humanity of Black people. Individuals who revere their own families, nationalities, traditions, and who are willing to defend those reverences with war, think so little of Black reverences for the same aspects of life that they do not even consider valid our contention that limiting the numbers of Black families in communities, pursuant to the proposition that Black people are a danger to the general welfare, is the ultimate promulgation of universal Black inferiority.

So, pointedly ignoring this basic moral issue, the proponents of integration maintenance relegate Black families to being no more

than subjects for zoning regulations; much as the placement and size of signs, the issuing of liquor licenses, or the leashing of pets. One has to read but little of the justifications for managing integration, to realize that the defenses regard Black people as being nothing more than a "problem" requiring solution.

We are particularly cognizant, Senators, that Black people are a "problem" in the eyes of integration maintenance proponents. And so the legendary victims of housing discrimination before the passage of the Housing Laws of 1968, bid fair to become also the victims of the newly proposed housing discrimination legislation masquerading as the preservation of integration and the prohibition of resegregation. After the Congress deliberated so diligently to come up those Fair Housing Laws to eliminate discrimination, legislatures throughout the country are being pressed to enact new ordinances and laws to burden Black families with a modern form of restrictive covenant, called "integration maintenance".

Our opposition to the enactment of laws to effectuate integration in housing by deliberate design has been met with derisive and sincere oath-taking, that the proponents of managed integration in housing do not have the limitation of the housing choices of Black families as a motivation. And if we would but trust them, we would soon see for ourselves. Besides, they say, show us where we have, or are, manipulating Black families to produce stabilized integration in housing. But that rejoinder takes us to be idiots at worst, or possessed with an extreme case of naivete at best.

In the first place, sirs, by what arrogant and patronizing authority do the advocates of scattering Black families around in communities conjure up their command to "trust them", while they shunt our Black families, friends, and acquaintances from pillar to post to keep whites from moving out of an area? Who is so presumptuous and self-important as to propose that my family not move together? As a matter of fact, which of any Black family that can afford a residence of choice should be the butt of manipulation to balance racial ratios in housing?

We have attempted to make a case that integration maintenance programs are the modern paradigm of every perpetuation of the of universal Black inferiority. Policies based on the maxim that Black families are the unfailing spoilers of communities derogate

a whole people without recourse. We have heard the old (but current) slur, "a nigger is a nigger". Well, gentlemen, integration maintenance programs imply that slur to a fare-thee-well. In the whole of the real estate world, for no other people is the sole criterion for acceptance that of an unredeemable measure...Race.

But, as we have alluded to earlier, the proponents of managing population for racial balance disregard our analyses of the assault on the Black family that must result from government managed housing integration. Instead, the advocates invariably attempt to justify their proposals with legal and economic vindications. The very use of such justifications, however, means that it has already been decided that Black people can morally be treated as exceptions to the ideal that Americans ought be able to live where they choose and can afford. There is, of course, nothing new in this exclusion of Black citizens from the prerogatives of American citizenry. It used to be called "discriminatory" to promulgate policies that would exclude Black people from full exercise of housing choice rights. Now, even liberals in the cause of civil rights propose laws that would manipulate such choice.

These proposed circumscriptions and restraints on the basic right of Americans to move where they choose and can afford, though we consider them to be the foremost injustices committed by integration programs, far from exhaust the list of inequities inherent in the programs. Many of the economic and legal prerogatives expected as a matter of course for American citizens, are routinely suppressed by the machinations of integration maintenance policies.

Freedom of the American citizen to engage in individual entrepreneurship is in the forefront of those expectations. Certainly the drive is in the air today to make more successful businesspersons. The real estate field is no stranger to the trend. The selling and renting of housing has the possibility of ample rewards to its practioners. When we look at the primary training manual for real estate salespersons, however, what do we see? That the number one requisite for success in the field is the salesperson "prospecting" for sellers and buyers of houses. And where does the broker get the prospects primarily; from one's day to day social contacts. One starts by listing the prople known who might send contacts. There is no escaping this simple mandate for success in the business, gentlemen. But under managed

integration programs, the prospective Black real estate business person is estopped from exercising that number one requirement for success.

A Black citizen wishing to build a real estate business will be hampered from doing so by integregation maintenance programs, in various ways. Consider the obvious necessity to show prospective buyers a piece of real estate. Integregation maintenance programs start with the mandate that real estate brokers ought to show parcels in some proportion that reflects the racial ratio considered desirable for the maintenance of white residency. This, they aver, insures against "under", or "over" representation in specific housing ares, of either Black or white renters. But please reflect, gentlemen: where does a real estate salesperson cull prospects? There are no more appropriate places than his or her social contacts. The daily social contacts of Blacks are by far in those places that would and could supply only Black prospects for the salespersons. Integration maintenance in housing wipes outs golden opportunities for Blacks to succeed in the real estate field; by barring Blacks from assaying their best sources for customers. No others are so restricted in this manner from mining their best possible sources.

Beyond restricting the business possibilities of Black entrepreneurs, integration maintenance programs consistently endeavor to force Black families to settle for less value for their dollars. Policies of integration maintenance divert Black families into higher priced housing. As an example; in the southern suburbs of Cook County, Illinois, housing prices are 20% and more lower than for comparable housing in other areas of the County. Yet managed integrationists would like to shunt Black families off into these higher price areas, in order to "balance" the ratio of Black to white throughout the area. The upshot is that Black families are routinely expected to pay possibly tens of thousands of dollars more for a house, in order to facilitate integration maintenance.

Advocates of managed integration consistently remind us that the maintenance of property values is a clear result of their proposals. We would suggest, sirs, that the possible several thousands of dollars that the vast majority of ordinary homebuyers will realize from property value appreciation, will not come near the combina-

tion of higher prices and higher interest costs that will accrue to Black families foregoing housing in an area of real estate bargains, because integration maintenance has decreed that a particular community has enough, or an excess of Black families.

It is no secret, gentlemen, that the income of Black families averages tens of percentage points less than that of others. Yet, integration maintenance programs would impose a penalty of those lesser incomes, by insisting that Black families buy dearer for the sake of "racial diversity". We do not say that there is some sort of conspiracy to keep Black people from getting the best value for their housing dollars (a prerogative that integration maintenance advocates would certainly reserve for themselves), but we feel that very few proposals are more effective at accomplishing the deed than managed integration in housing. The 1980 Census shows vividly how, in community after community, Black families who moved to the suburbs have paid significantly higher prices for their homes. Integration maintenance cannot be fairly faulted for that circumstance, but it certainly has the potential for compounding the state-of-affairs.

In the final analysis, gentlemen, managed integration in housing requires Black families to accept paying higher prices than necessary for houses, for the success of plans that at the same time derogate them. The advocates of managed integration would not accept such an invasion on the value of their dollars.

Our testimony has attempted throughout to persuade that the idea of managing housing for purposes of maintaining some thought to be desirable ratio of Black to white families in communities, is not a worthy of undertaking by a society dedicated to the democratic ideals embodied in the Declaration of Independence, beginning, "We hold these truths to be self-evident...". We would maintain that the Congress made a major contribution to the realization of the ideal with passage of Title VIII of the Civil Rights Act of 1968 (The Fair Housing Law). Without gainsaying the need to amend Title VIII to strengthen enforcement, we would say that enactment of the Fair Housing Law was one of your finest hours. You provided effective legal machinery to combat discriminating in housing.

Any serious study of the 1980 Census will reveal that Title VIII has resulted in an almost revolutionary alteration in the racial housing patterns of this Nation. We see that in community after community, where there were little or no Black families before the Law, by 1980 the numbers had jumped percentagewise several hundredfold, and at this date are even perceptively moreso.

There are, we suggest, enough laws on the books, Federal, state, and local, to wage an effective fight against housing discrimination. Ironically enough, gentlemen, it is probably the very succesee of the present Fair Housing Act, that has brought us to the current drive to change the Law to countenance management of racial proportions in communities, neighborhoods, and buildings. It can easily be observed that the municipalities striving most diligently for legally sanctioned integration maintenance are precisely those areas where Black families have made the most use of the existing anti-discrimination housing laws. A dilemma has formed: One composed of part racism; part people's inclination to want to voluntarily live with "their own"; part reluctance by the advocates of integration maintenance to concede the possibility that Black people could actually prefer to live largely among other Blacks; and part various other factors. Proponents of integration maintenance appear to dismiss the notion that any sensible Black would want to live in communities, neighborhoods, and buildings that are not integrated; or, they believe that if Black people do indeed like to live next to their own people, those Blacks should not do it in integration maintenance advocates' "backyards". As they have said a number of times, "...there are many opportunities for separate living, but few for those who wish to live in stably integrated communities...".

The dilemma has brought us to a Senate Judiciary Subcommittee Hearing on "integration maintenance". Perceiving that a Federal mandate will be most proficient for meeting the ends of managed integration in housing, proponents have taken the case to Washington; urging the Federal Government to go much further than the basic housing anti-discrimination laws already on the books: indeed pushing for the Government to expand "anti-discrimination" to mean "maintaining integration". We trust that this august Body will

turn down the opportunity to legislate that expansion. We do not think that the sense of the Congress was to equate "anti-discrimination" with "maintaining integration", and we offer the following legal synopsis in support of that opinion.

II. LEGISLATIVE AUTHORIZATION:

On April 11, 1968, The Federal Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 USC §3601 et. seq. ("Fair Housing Act"), a landmark piece of legislation, was enacted into law. This was one week following the tragic assassination of Dr. Martin Luther King, Jr., and more than two years after President Lyndon B. Johnson first announced his intention to seek such legislation in the State of the Union Address of January 12, 1966. On March 31, 1968, Lyndon Johnson had announced his intention not to seek another term as President, and there was massive urban unrest in Black communities throughout America, following Dr. King's death. This brief historical background is set forth to demonstrate the lengthy period of time that the legislation was debated and discussed in Congress, and the remarkable events associated with the enactment of the Fair Housing Act.

After years of indirect legal attack, and even more years of total inaction, a piece of Federal legislation was placed on the books, directly attacking the chronic evil of housing discrimination in America. Prior to the enactment of the Fair Housing Act, Blacks seeking housing were faced with an intricate and impassable web of opposition; including Realtors, municipalities and their officials, the various state governments and officials, the Federal government, savings and loans, banks, and last but not least, chronic, rampant, widespread, plain old-fashioned individual private racism.

Constitutional challenges, and statutory cases using some of the old civil rights acts, dating primarily from the Reconstruction era, had sometimes been utilized to mount attacks on discriminatory housing practices; Shelley v. Kramer 334 US I (1948); Evans v. Abney 396 US 435 (1970); Jones v. Alfred H. Mayer 392 US 409 (1968); Linmark Associates, Inc. v. Township of Willingboro 431 US 85 (1977). These efforts, although helpful, were of limited utility and breadth. An 18th century, generalized, ambiguous Constitution, and its later amendments, were never intended to focus on the realities of 20th century

housing discrimination. Nor were the amendments to the Constitution such as the 13th and 14th intended to focus on housing discrimination. The civil rights Reconstruction era statues, although more useful than the aforementioned items, had been little used until relatively recently, and they are not really focused on the modern evil of housing discrimination.

There is an even more difficult problem with a constitutional approach to housing discrimination. As any lawyer knows, Federal Courts positively loathe construing the Constitution to grant or take away a right. As a matter of self-imposed judicial restraint and construction, constitutional issues are addressed only if a court is backed into corner, and all precedural regularities are followed, and there is no alternative, either statutory or judicial, to addressing a constitutional issue. This is true of all areas of law, not just housing. Moreover, the focus of the Constitution is on Federal, state, or local governmental action, and the balancing of the rights of individuals or non-governmental intities in respect to the various branches of government. Many of the perpetrators of housing discrimination as individuals or non-governmental bodies, constituted very difficult targets for attack on the issue of fair housing.

The Fair Housing Act made it unlawful to (1) discriminate in the sale or rental of a dwelling based on the forbidden reasons of religion, race, color, or national origin, (2) to refuse to sell or rent or negotiate, or otherwise make unavailable a dwelling for the aforementioned reasons, (3) to print or publish anything regarding the rental or sale of a dwelling indicating a preference, limitation or discrimination based on the foregoing reasons, (4) to represent to any person that a dwelling is unavailable for inspection or sale or rental, for the foregoing reasons, (5) for profit to induce the sale or rental of a dwelling by representations regarding the entry of persons of the foregoing groups. The Secretary of the Department of Housing and Urban Development is charged with the responsibility of administering the Fair Housing Act.

It is abundantly and plainly clear that on the face of the Fair Housing Act, "integration maintenance", affirmative marketing, or fair housing quotas are simply illegal. These programs proceed from the supposition that there can be too many Blacks in a community, and that efforts should be made by local governments to restrict and limit the number of

Blacks in a community, and to increase and maintain the number of whites. Blacks should always be a minority of 2% to 20% of the community in this scheme. Once these levels are reached, further Black movement into a community should be discouraged. More whites should be encouraged to move in.

In order for integration to be maintained, Blacks must be restricted from exercising their full rights under the Fair Housing Act, and from enjoying the same rights as others. Blacks are willing to live in neighborhoods as a minority. As a general rule, whites are not. Indeed, there is supposedly a tolerable level of Blacks beyond which a community reaches its tipping point and white flight results. The reason for this is racism and prejudice; two evils which cannot be catered to, or approved, if one is to remain in conformity with the Fair Housing Act.

It is interesting to note that no other group has been singled out for balancing pursuant to these programs. Only the historical victims of the overwhelming majority of housing discrimination have been designated for the limiting. "Integration maintenance", by basing its decisions solely on race, and restricting only Blacks, violates every single provision of the Fair Housing Act, except the blockbusting provision. Black rights to housing, either via purchase, sale, or rental, cannot be based on race.

The Fair Housing Act is not an integration law. Its purpose and intent is to remove harmful discrimination from the backs of traditional victims. Nowhere does the statue directly or by inference state that integration is its purpose. The Law seeks to open the housing market to Blacks, by barring discrimination. Integration will be the result of this process, but integration itself is an end, not a process. Although some municipalities may actually have an arguably laudable motive - racial integration - for proposing these programs, that does not legally protect. There is no such thing as a benign quota, or benign discrimination in housing where Blacks are concerned. Good intentions must be balanced against the discriminatory impact of these programs on Blacks.

Housing is not like education or employment. It has a unique history and set of problems. In housing, Blacks have been able to compete rather effectively without quotas or floors assuring a minimum level of participation. What the municipalities are railing against in the integration main-

tenance area, is the anomalous situation of a law that is perceived as being too successful. "Integration maintenance" offers a cap or ceiling limiting one group-Blacks-and this is illegal, regardless of the motive or identity of the proponents. If racial ceilings are not illegal, then the whole statutory framework is a mere edifice erected for show, and is not intended tO be effective.

42 USC §1981, and 42 USC §1982, the so-called 1866 Civil Rights Acts, grant to Blacks, and indeed all citizens, the same rights as whites, with respect to most legal matters; particularly the right to, "...purchase, lease, sell, hold and convey, real and personal property". These laws are of particular interest, since it has been held that they focus both on governmental and private action; e.g., municipalities, which gives them much wider scope. 42 USC §1982 is not, however, a fair housing law. In Jones v. Alfred Mayer Supra the Supreme Court gave a sweeping, broad-based interpretation to §1982 which was enacted pursuant to the 13th Amendment. This extended the Law's protection to state as well as private action. This case, coming as it did hotly on the heels of the enactment of the Fair Housing Act, was a landmark.

Treating Blacks as undesirable members of a community, and restricting Black rights in the name of integration, violates the 13th Amendment, as well as 42 USC §1982. Such action stigmatizes Blacks with the badges and incidents of slavery, contrary to the 13th Amendment. Moreover, Blacks would not have the same rights as whites pursuant to such programs, and this violates 42 USC §1981. Neither the 13th Amendment nor §1982 make any exception for alleged good intentions.

Finally, the 14th Amendment guarantees the equal protection of the laws to all citizens. Because you have state or other governmental action, in the guise of the municipalities, the application of the 14th Amendment to integration maintenance programs is relatively clearcut. Blacks are not given equal protection under the law pursuant to these programs. Black rights are restricted and limited as compared to all other Americans. This is constitutionally impermissible.

The Southern Poverty Law Center

SPECIAL REPORT:

"Move-In" Violence: White Resistance To Neighborhood Integration in the 1980's

Published by the KLANWATCH Project
of the Southern Poverty Law Center
Montgomery, Alabama

FOR RELEASE FEB. 5, 1987

FOR MORE INFORMATION,
Bill Stanton or Pat
Clark, 205 264-0286

KLANWATCH is a project of the Southern Poverty Law Center established in 1980 to conduct litigation, publish educational materials and do monitoring in the area of right-wing extremist groups, particularly the Ku Klux Klan. The SPLC is a non-profit, tax-exempt legal and educational organization founded in 1970. The Klanwatch Project is totally funded by the SPLC, which receives its funding from contributions from individuals who respond to direct mail requests. No local, state or federal funding is involved.

THE SOUTHERN POVERTY LAW CENTER
Klanwatch Project
400 Washington Avenue • P.O. Box 548
Montgomery, Alabama 36195 5101

SPECIAL REPORT:

"Move-In" Violence: White Resistance To Neighborhood Integration in the 1980's

By the KLANWATCH Project

Racist violence has followed the migration of minority families to the suburbs, as intransigent whites resort to the firebomb, the burning cross and the racial slur to preserve racially segregated neighborhoods in cities across the U.S.

From Baltimore, where a black family has been the target of firebombers twice in the last eighteen months, to Louisville, where racists arsoned a black family's home in 1985 on the very day they moved in, minority families are under siege as they attempt to exercise their right as American citizens to live wherever they choose. A good argument can be made that "move-in" violence[1] is the most common form of violent racism in the country today -- and one which stands to increase as greater numbers of minorities, particularly blacks, move into previously all-white areas.

Despite the national scope of the problem, no nationwide system exists among federal or state law enforcement agencies for keeping record of such incidents, and no one can say authoritatively whether or by how much violent acts are actually increas-

[1] So named by law enforcement officials and social workers.

ing.

But individual cities, including Philadelphia, Chicago and Cleveland, appear to be experiencing increases in the number of such incidents reported to human relations agencies and police.[2]

Whether or not these scattered findings suggest a national trend, they reinforce the impression left by television images of white mobs in Philadelphia, Howard Beach and Forsyth County, Ga., that violent racism is indeed on the rise.

The Klanwatch Project of the Southern Poverty Law Center in Montgomery, Ala., recently concluded a study of move-in violence for the years 1985-86 and found it to be a serious, under-reported social problem nationwide.[3]

Ironically, the problem cannot be blamed entirely on the Ku Klux Klan or the neo-Nazis, whose numbers have actually declined since the early 1980's.[4] To the contrary, in those few cases where arrests are made, the perpetrators of these attacks are rarely found to be card-carrying racists. This is not to minimize the Klan or other white supremacist groups, which represent a very real threat to minorities in selected communities across

---

[2] Few communities keep track of racist violence incidents. In those which do, recordkeeping is still in the embryonic stage, and authorities are generally reluctant to attach too much meaning to their figures. Unofficially, many believe the problem is worsening.

[3] The study is based on information gathered through the daily monitoring of U.S. newspapers and additionally from government reports and interviews with several dozen human relations specialists and police officials.

[4] According to figures issued by the Anti-Defamation League, KKK strength in 1981 was projected between 10-12,000 members. By the end of 1986 that estimate had declined by half.

the country. But attacks against "move-ins," as the victims are called, are occurring in communities which haven't seen a Klansman since the heyday of the KKK in the 1920's. This finding, like the searing TV images of the white street mobs, suggests that violent racism runs broader and deeper in our society than most white Americans are comfortable admitting.

A second irony is that move-in violence may be as acute in the North, the Midwest and the West -- regions not traditionally associated with violent racism -- as in the South. Since 1985 a majority of the 45 known arson and cross burning attempts against move-ins have taken place in metropolitan areas of the North and Midwest, and the only known death connected to housing-related strife occurred in Cleveland.[5]

The data from this study -- incomplete as it necessarily is -- also shows that the phenomenon of move-in violence in the U.S. is only one aspect of the larger problem of racially, religiously and ethnically motivated violence: "hate violence" for short.[6]

Most hate violence attacks in the U.S. are perpetrated by whites against minorities. White-on-black incidents constitute

---

[5] A 66-year-old black woman, Mabel Gant, died in the arson of her home June 2, 1985.

[6] The term "hate violence" denotes the entire range of acts of intimidation and violence motivated by race, religion or ethnicity. Aside from move-in situations, among the most common precipitating events are interracial dating, political activism and employment-related conflicts. Some of the worst hate violence attacks are purely random. According to reports reaching the Southern Poverty Law Center, three blacks and an Asian have been murdered in random violence in the past two years.

78-076 0 - 88 - 34

the majority of such incidents, but white attacks on Hispanic, Asian and Jewish victims are also of serious proportions.[7] Lately intergroup conflict between minorities, such as blacks and Asians, has emerged as a growing facet of the overall hate violence problem.[8]

The focus of the Klanwatch study was the slice of it pertaining to minorities who move into all-white or mostly white areas in U.S. cities and suburbs.

Attempts to drive minorities out of all-white or predominantly white neighborhoods most frequently take the form of intimidation and harassment rather than physical violence, yet even these incidents can be devastating emotionally. Such acts often consist of grafitti paintings, minor vandalism to home or property, or threatening phone calls or letters. Literally hundreds of such incidents happen each year, in cities big and

---

[7] On a positive note, anti-Semitic incidents have declined in recent years, according to the Anti-Defamation League. At the same time, most incidents of anti-Semitism do not fall into the "move-in" category in that they generally are not precipitated by a victim moving into a neighborhood of a certain racial or ethnic makeup. Anti-semitic incidents seem to be motivated by factors other than the move-in syndrome, although at one time Jews were the targets of move-in violence.

[8] Asians, in fact, are increasingly the targets of both whites and blacks, according to Wallace Warfield, head of the Justice Department's Community Relations Service, based in Chevy Chase, Md.

small, in the North and West as well as in the South.[9]

When initial efforts to force the family to flee do not succeed, the hate campaign is often stepped up, sometimes leading to cross burnings, firebombings or arson. But generalizations about incidents are risky -- in other cases the more violent methods are employed as a first resort, not as a last one.

The firebombing of the Marshall home in Louisville is a case in point. The Marshalls are a middle-class black family who struggled to save enough money to leave their less desirable, central-city neighborhood for the suburban life of Sylvania, a mostly white, blue-collar community about twenty minutes from downtown Louisville.

On June 30, 1985, the Marshalls made the long-awaited move into their dream home. They were immediately greeted with hostility, as passersby began yelling racial slurs even before family members could finish unloading their possessions. Later that night a firebomb exploded through a window, setting the house on fire and forcing the family to flee for their lives. The next morning KKK posters were found on a tree and a telephone

---

[9] Maryland alone reported 423 hate acts of all kinds in 1986, a decline from 441 in 1985, according to Joanne Anderson of the Maryland Human Relations Commission. The Pennsylvania Human Relations Commission, which collects statistics based on a fiscal year of July 1 - June 30, noted an increase from 67 incidents in FY85 to 124 in FY86. It is unlikely that hate activity is four times worse in Maryland than in Pennsylvania, a state several times its size. The disparity illustrates the need for a uniform, nationwide reporting system which will paint a more reliable picture of hate activity. Paradoxically, communities with the most comprehensive reporting systems appear on the surface to be experiencing the most serious outbreak of incidents.

pole in the yard and along the street. Within weeks three young whites were arrested -- none of them Klansmen -- but arsonists struck again on August 21, this time completely destroying the structure. An investigation revealed the Marshalls were at least the third minority family run out of the neighborhood in approximately two years and the second whose house had been arsoned.[10]

Like the Marshalls, many victims of move-in violence and harassment, ironically, are middle-class citizens who simply want to buy a piece of the American dream -- the ownership of a home in a safe, quiet neighborhood -- only to find that race counts more than money to their white neighbors. Most of the remaining victims of move-in violence are minorities who locate in all-white urban neighborhoods, some of which have centuries-old segregation traditions.

The mid-80's are replete with examples of both. In Chicago last summer, arsonists twice struck the home of a black family which had moved into an all-white neighborhood in Gage Park earlier in the year. The attacks were simply the most violent assaults of a six-month campaign of intimidation to drive the family out.

In the wake of such incidents the tendency of public officials is all too often to downplay the seriousness of the attack and to characterize the perpetrators as unrepresentative

---

[10] Source: Klanwatch investigative files. The Southern Poverty Law Center filed suit on behalf of the Marshalls against the three young whites arrested in the first arson. No arrests have been made in connection with the second attack.

of the community, even in the face of strong evidence to the contrary.

The fact is that violent racists may believe they are carrying out the will of the community -- and, in fact, may be doing so. A neighbor of the Chicago victims was quoted by a reporter as saying, "I don't think [arson] is right. But it's also not right for them to come into a neighborhood when it's all white."[11]

Chicago had a hot summer in 1986 from the race-relations standpoint, perhaps reflecting the city's political climate -- or vice-versa. In addition to the pair of arson attacks, several hundred police officers had to be called out on June 28 to prevent violence between Klan and anti-Klan protesters in the mostly white Marquette Park area, and a march of about 80 blacks that same day was disrupted by a mob of several hundred whites hurling racial epithets, rocks and bottles. At issue was whether blacks have the right to move into predominantly white southwest Chicago neighborhoods. A reprise of the incident was played out August 23, when 700 police were marshalled to protect 15 black marchers from an angry crowd of 500 whites.

In a Baltimore suburb suspected racists finally succeeded in forcing Joyce Jones and her family out of a predominantly white neighborhood last summer. For the second time in less than twelve months, someone tossed an explosive device at her townhouse in North Point Village, a community in eastern Baltimore

---

[11] Chicago Sun-Times, August 26, 1986.

County. The first attack failed when a Molotov cocktail thrown at the home on August 24, 1985, landed harmlessly on the lawn. But last June another attempt to burn down Mrs. Jones' house nearly ended in tragedy, and the close call persuaded her to move her family to a safer location. Neither incident has resulted in arrests.

Philadelphia is one of the cities hardest hit by racial problems. Whites there have been as overtly and aggressively racist as anywhere in the nation in erecting barriers to the integration of white neighborhoods. When a black couple and an interracial couple simultaneously moved into the southwest Philadelphia community of Elmwood during November 1985, a hostile mob of 400 whites demonstrated for two nights in front of their homes, cursing and threatening the new residents and chanting racial slurs. Faced with a riot or vigilantism, Mayor Wilson Goode imposed a ban on public gatherings in Elmwood in an attempt to restore order. But that didn't stop four young whites from torching the residence of one of the couples several weeks later.[12]

White attitudes seem to have softened little in the City of Brotherly Love since then. Last March a group of young whites gathered in front of the home of an Asian family in a mostly white, workingclass neighborhood and began taunting the refugees, making ethnic slurs and casting rocks and bricks through the

---

[12] The four, ranging in age from 18-25, were arrested and successfully prosecuted on federal civil rights charges by the U.S. Attorney in Philadelphia.

windows of the house. The incident erupted into full-scale violence when two of the Asians fired weapons at the whites, grazing one of them in the head.

Then in July a black woman, Amzie Denson, was rebuffed in two attempts to move into homes in all-white neighborhoods. On the first occasion 75 whites massed in front of the home Denson intended to rent, in a scene reminiscent of the Thanksgiving week protests several months before. Although Denson did not witness the incident, she learned of it later and gave up on plans to move into the home. A house she viewed in another neighborhood was subsequently defaced with racial slurs, discouraging her from considering it as well.[13]

Philadelphia has also seen the "other" side of move-in violence. In the wake of the large influx of Asian refugees into the U.S. following the Vietnam War, thousands of Laotians of the Hmong tribe settled in an area called Powelton Village, a mostly black community on the city's West side. Blacks, accustomed to being the victims of racist violence, became the perpetrators of it against the Hmong. Convinced the Hmong received preferential government economic assistance denied to blacks, some young blacks harassed, threatened and attacked the refugees, in the same way as poor whites historically have scapegoated and attacked blacks. Once 6000 strong, the Hmong community in Powelton village had dwindled to 500 by 1985, partly as a result of wanton

---

[13] Philadelphia police arrested a suspect, who was convicted on the strength of the testimony of a young eyewitness and was sentenced to a year in jail and a $2500 fine -- by national standards a comparatively harsh penalty for the crime.

attacks by their black neighbors.

In the Boston area, Vietnamese refugees have been attacked on the street as well as in their homes, and in July 1985 a house where 37 Cambodians lived in a poor white neighborhood in suburban Revere was set on fire and destroyed. No one has been arrested, but victims and social workers alike are convinced it was arson. Several incidents of harassment against the victims preceded the fire.

Two cross burning incidents directed against black "move-ins" marred an otherwise peaceful racial climate in Nashville between June 1985 and August of last year, and a firebombing in January 1985 drove a black family from its home in a predominantly white north Atlanta suburb, where move-in violence has been a serious problem in recent years.

Not even college campuses are immune. Once in the vanguard of the civil rights movement, colleges and universities now reflect the prevailing conservative mood of the country, so it should be no surprise that acts of hate violence should also seem to be on the rise in academia. In Tuscaloosa, Ala., two white students were arrested last March for burning a cross in front of what was to become the first black sorority house on the University's all-white Sorority Row.

But the most deadly act of move-in violence in the past two years occurred in Cleveland on June 2, 1985, when arsonists firebombed the home of 66-year-old Mabel Gant, a black woman. Gant, who was killed in the fire, had lived in the mostly white neighborhood for two years. White juveniles are suspected in

her murder. The day after the attack a black family which had moved into an area close by, on the mistaken assumption it was integrated, received a newspaper clipping of the Gant firebombing inscribed with the note, "You're next."

Since then, racist violence and intimidation -- including a cross burning -- have erupted in other Cleveland neighborhoods where blacks have crossed the color line.[14] Total move-in incidents rose from 50 in 1985 to 77 in 1986, according to the Cleveland Human Relations Commission.

Some of the decade's most publicized incidents of racist violence and intimidation have happened in the past 15 months: the already-cited mobs in the Elmwood section of Philadelphia; a racially motivated hazing incident at The Citadel in Charleston, S.C.; the murder of a young black man in the Howard Beach section of Queens in New York City; and, as this report was being prepared, a white mob's rock-throwing attack on a civil rights march in Forsyth County, Ga.

Aside from The Citadel situation, these incidents have something in common with the hundreds of other less publicized attacks that occur each year: the desire on the part of racist whites to preserve racial segregation in their neighborhoods or communities. At the core, that is what the recent attacks were all about. It was the sole reason the mob gathered outside the homes in Philadelphia's Elmwood community, where until just

---

[14] The most publicized occurred last summer when a black man fired on a group of whites who had harassed and threatened a black move-in family. Several whites were injured in the shotgun blast but decided not to press charges.

recently residency had been a whites-only proposition for more than two centuries. According to the accounts of survivors and witnesses, it was the prime motivation for the attack in Howard Beach. And in Forsyth County, where blacks were expelled 75 years ago, the fear that they would move back was the spark that ignited an outpouring of white protest verging on mob violence.

Communities with the potential for becoming the next Forsyth County or Howard Beach are not as rare in the U.S. as many would like to believe. In the hilly, non-farming regions of the South there are numerous Forsyth counties, where blacks know they are neither welcome nor safe. Cullman County, Ala., is one such place.[15] In 1978 -- in a mirror image of the Forsyth County incident which attracted far less media attention -- a mob of 2000 jeering whites halted a march on Cullman by about 20 blacks from another county, forcing state troopers to whisk the marchers away for their own safety. Just as in Forsyth, the mob included Ku Klux Klansmen, who only agitated an already-tense situation.

But neither the Cullman nor the Forsyth incidents were creations of the KKK, and both the media and the public miss the point if the focus on Forsyth centers too narrowly on the Klan, for there can be no doubt at all that the incident would have happened even had the Klan not been involved. Of much greater concern should be the spectre of white vigilantism in the 1980's and the conditions which spawn it, whether in Forsyth County,

---

[15] Unlike Forsyth, Cullman County does have black residents, who comprise about one per cent of the population.

Philadelphia, Chicago or New York.

Forsyth and Cullman are just two Southern counties -- among many -- where whites have never glossed over their dislike for blacks. Years ago citizens in both counties set up signs at the county line proclaiming, "Nigger, don't let the sun set on your head in Cullman [Forsyth] County." With the coming of the civil rights movement the signs came down, but the prejudices stayed.[16]

It is common knowledge locally among both blacks and whites where these danger zones are. Black parents in the northern regions of Alabama, Mississippi and Georgia, for example, still warn their children to avoid certain white communities, at least after dark. It is a warning which has been passed down from generation to generation. But one would be naive to think such conditions are confined solely to the South. In the North and West there are still neighborhoods and sometimes whole communities which, as a practical matter, are off-limits to minorities, and most local minority residents wouldn't dream of trying to purchase a home in these communities.[17]

In the wake of the most recent violent incidents, civil rights activists, reporters and people of goodwill around the nation are asking two fundamental questions: why are these

---

[16] In 1978 a black civil rights activist hitchhiking through Cullman County was abducted from the shoulder of Interstate 65, stripped and beaten, then released. Shortly thereafter a Ku Klux Klan leader publicly admitted the Klan had carried out the abduction but disavowed any knowledge of the beating. Later he denied any KKK involvement in the attack.

[17] A Southern Poverty Law Center employee comes from a town in New Jersey located adjacent to just such a community. "Blacks have always known they were not allowed to live there," she says.

incidents happening? -- and are they increasing?

Neither can be adequately answered at this time. Without better data, no one can say with certainty whether violent racism is actually on the upswing or whether it is merely receiving more attention from social workers and the media alike. There is evidence of truth in both explanations. This report has already taken note of the fact that several major cities have recently reported increases, and Klanwatch files reflect an increase in major incidents in both 1985 and 1986 over 1984. But because those agencies which track incidents have begun to do so only in the last two or three years, it is difficult to characterize their current crop of statistics as either reliable or indicative of a trend.

Similarly, as awareness has increased among journalists, reporters have recently focused more on this issue than in past years, when incidents of the magnitude of Howard Beach and Forsyth County suffered from media neglect.[18]

Wallace Warfield, head of the Justice Department's Community Relations Service (CRS), cautions that the present spate of hate violence activity must be viewed in historical context. While the seriousness of these attacks cannot be minimized, Warfield says, the apparent increase in the number of attacks suggests at least that the process of neighborhood integration is going forward in American society, however fitfully.

---

[18] This observation is not meant to assign blame; civil rights advocates may have been remiss in failing to draw attention to the problem.

Warfield also points out the cyclical nature of racist violence in U.S. history: periods of turbulence, as illustrated by the post-Reconstruction era in the South, the race riots following World War I. and the upheaval of the 1960's, succeeded usually by years of relative calm. The contemporary situation may reflect yet another cycle of violence, according to Warfield. Of all hate violence incidents reported to CRS currently, a full forty per cent involve move-in violence, Warfield said.

Some human relations specialists worry that the problem is substantially more serious than the present limited data suggest. They warn that the number of reported incidents may represent only the tip of the hate violence "iceberg" because, they say, victims often fail to report attacks, either out of fear, denial or the conviction that law enforcement and the community at-large will view the incidents as pranks or the work of juveniles.[19]

In light of the deepening concern that violent racism is experiencing a revival, the Southern Poverty Law Center and its Klanwatch Project endorse the concept of a nationwide law enforcement reporting system to keep record of hate violence incidents. The system, under the direction of the F.B.I. or some other federal law enforcement agency, would simply require the

---

[19] The fact that juveniles or young adults are responsible for many hate attacks has provided an easy "out" for public officials and whites in general to dismiss the incidents as pranks. The perception by some victims that no one cares is further compounded by a long tradition of insensitivity on the part of some law enforcement agencies, which are still viewed by victims as unsympathetic or hostile to their plight. In fairness to the police, many agencies are understaffed and overworked. Faced with solving homicides and robberies or cross burnings and vandalism, an officer's choice is clear-cut.

collection of hate violence incidents from state and local police agencies, in the same way the F.B.I. now gathers statistics on other areas of crime through its Uniform Crime Report. There is no clearinghouse on hate violence activity -- law enforcement or otherwise -- at this time.

Such a system would be a starting point and would provide public policymakers, civil rights activists, legislators and the general public with a more reliable statistical picture of the phenomenon. Just as importantly, it would enhance the prospects for fashioning effective responses.

Because move-in violence specifically and hate violence in general are national in scope and frequently involve violations of federal civil rights laws, the participation of federal law enforcement agencies in any reporting system is critical. Legislation to require such a system was introduced by Rep. Barbara Kennelly (D-Conn.) in Congress last session. It passed the House but failed to clear the Senate. An identical bill is expected to be introduced in the new Congress within days.

Currently, few police agencies anywhere keep record of hate violence incidents, although several major cities, including Los Angeles, Boston and New York, have created special units to handle hate crimes in recent years. The first agency to record incidents on a statewide basis is the Maryland State Police, which does so as a part of a pioneering government-wide effort begun under former Gov. Harry Hughes to monitor and combat hate

violence.[20]

Under the Maryland system, local police agencies are required by state law to keep such records and periodically to feed their data to State Police headquarters, which processes it. Although the system is imperfect -- the quality of reporting varies from town to town according to the commitment of the specific police agency to participate -- it nevertheless marks a beginning and is expected over time to become a yardstick for measuring trends in these crimes.[21]

Currently there are two key deficiencies in the way most law enforcement agencies process hate violence crimes: first, incidents are not classified by racial, ethnic or religious motivation, making it virtually impossible to tabulate hate violence acts, spot trends and perform analysis. A race-related assault is recorded only as an assault; an arson against move-ins is

---

[20] Maryland began responding in a systematic way to hate violence about 1980, following an upsurge in both hate acts and KKK activity. Spurred on by a Baltimore-based coalition of public and private agencies, then-Gov. Harry Hughes ordered a full-scale government campaign to fight bigotry and extremism. Legislation was enacted upgrading certain hate-motivated offenses to felonies and requiring police to keep track of incidents. Programs were developed for schools. The University of Maryland conducted research. Eventually the National Institute Against Prejudice and Violence was created by lawmakers to develop further programmatic responses. The hard work and commitment paid off: the best models to follow in combatting bigotry and hate violence may be found in Maryland.

[21] Police in Baltimore and Montgomery counties have developed detailed procedures for handling hate violence crimes, from the point of commission through arrest and prosecution. These plans, which call for coordinatioon with social service agencies, address the human component of the crime and stress the need for officers to impress upon the victims that the community and the police view hate attacks seriously.

lumped with other arsons. The second problem is the mis-characterization of certain types of hate violence crimes: cross burnings are variously categorized as malicious mischief, vandalism or burning without a permit. Swastika paintings are often catalogued as grafitti incidents or mischief.

Besides requiring nationwide recordkeeping of hate violence crimes, a national reporting system would standardize the inconsistencies which now hinder meaningful analysis of law enforcement statistics.

Yet changes are needed not just in law enforcement but in the law itself. Under federal civil rights statutes currently on the books, for example, intimidation against minorities who move into white neighborhoods is only a misdemeanor unless bodily injury results; this must be changed. Cross burnings and terror campaigns inflict tremendous emotional suffering on their victims and should be dealt with before the law accordingly. The Congress should immediately move to upgrade this offense to a felony. State legislators can take steps to enact laws directed at the problem; a number already have.

Furthermore, the Southern Poverty Law Center recommends the creation of a special unit within the Criminal Section of the Civil Rights Division of the Justice Department to monitor move-in violence and prosecute its perpetrators. Under the Reagan Administration the Justice Department has compiled an impressive

record of prosecuting Ku Klux Klan and Klan-type violence,[22] but even more can and must be done. The Civil Rights Division should be given the resources and the lawyers to make as many cases as possible in order to bring move-in violence under control.[23]

But violent racism is far more than a law enforcement problem, and an effective response must encompass an array of remedial measures. At the grassroots level, schools and churches should undertake a program of education to promote racial harmony and understanding. Politicians and civic leaders as well must exert positive leadership to set a tone of tolerance in the comunity.

In the final analysis, these measures, not tougher laws or better law enforcement, offer the only real hope of lasting change. In the two hundredth year of the Constitution, there is no celebration more appropriate than to extend its guarantees fully to all Americans, including one of the most fundamental rights: to live wherever one wishes, free of the fear of racially, religiously or ethnically motivated violence.

---

[22] According to Justice Department figures, 35 racial violence cases were prosecuted by the Department during the first term of the present Administration, compared to 22 during the term of former President Jimmy Carter. Since 1985, Justice Department lawyers have prosecuted 12 additional cases.

[23] Where local authorities will prosecute, they should be given every opportunity. In an increasing number of cases, prosecutions are originating at the local level. However, move-in attacks are federal crimes, and ones that strike at the core of one of our most treasured individual freedoms. A nationally directed effort would ensure enforcement where local authorities are unwilling to act. It would have the added benefit of symbolizing the national government's resolve.

APPENDIX

A Sample of Serious Move-In Incidents, 1985-86

DATE	PLACE	INCIDENT
1-9-85	Marietta, GA	A black family fled an all-white neighborhood after firebombs were tossed into the yard of their home.
5-25-85	Boston	Three Asians were attacked in their home by whites shouting racial epithets and death threats. The home was in a mostly white area.
5-31-85	San Diego	A white man was charged with federal civil rights violations in connection with a campaign of intimidation against a black family which moved into a mostly white neighborhood several months before. The defendant allegedly burned a cross in late 1984 and set fire to the victims' vehicle in April 1985.
7-16-85	Revere MA	The home in which 37 Cambodians lived in a poor white neighborhood was set on fire. Though no one was arrested, victims and social workers are convinced the blaze was ethnically motivated. Residents of the home had been harassed in the days preceding the fire.

6-11-85	Nashville, TN	Cross burned at the home of a black family moving into a mostly white neighborhood. Simultaneously three whites pounded on front door, yelling "Niggers get out."
6-30-85	Louisville, KY	The home of a black family in the white suburb of Sylvania was firebombed the night they moved in.
8-17-85	Elizabeth, NJ	A cross was burned outside a home being purchased by a black family in an affluent, all-white neighborhood. "No niggers" painted on driveway.
8-21-85	Louisville, KY	For the second time arsonists set fire to the home of a black family in an all-white neighborhood in Sylvania, outside Louisville. This time the house was a complete loss.
8-24-85	Baltimore MD	A firebombing attempt failed when an explosive device fell harmlessly on the lawn of a black family which had moved into a mostly white area of eastern Baltimore County.
10-26-85	Toledo OH	Shots were fired into the home of a black family which had just closed on a house in a mostly white neighborhood. Earlier that day a white male placed an anonymous phone call to the realtor to inquire if the house had been sold to minorities.

11-2-85	Amory, MS	A home recently occupied by a black family in a previously all-white area east of town was set on fire.
11-27-85	Forest Hills, PA	The home of a black couple preparing to move into a predominantly white community in this Pittsburgh was firebombed.
11-28-85	DeKalb County, GA	A firebombing attempt of a black residence in a predominantly white neighborhood failed when the fuses to the device were doused by moisture after the explosives fell short of their target.
12-12-85	Philadelphia	The home of a black family which moved into an all-white neighborhood was set on fire three weeks after white mobs demonstrated in front of the home. Four whites were subsequently arrested.
12-17-85	Cleveland	A cross was burned on the the lawn of a black family whose home was in a white pocket of the predominantly black South Collinwood community. Three young whites were later arrested. The next day a swastika and hate grafitti were spraypainted on a building near the victims' home.

1-9-86	Sandusky, OH	A cross was burned in the yard of a black family which had moved into a mostly white neigborhood only four days earlier. Two whites later pleaded guilty in the incident.
3-23-86	Philadelphia	Four whites were charged with ethnic intimidation and terroristic threats for allegedly making racial slurs and throwing rocks at the home of an Asian family in a mostly white neighborhood. One of the men was slightly hurt when two of the Asians fired on them.
3-29-86	Tuscaloosa, AL	Two white students enrolled at the University of Alabama burned a cross in front of a house scheduled to become the first black Greek house on the university's famed Sorority Row.
4-5-86	Sharon, MA	Three members of a white family pleaded guilty to federal civil rights charges in connection with a six-month campaign of harassment against the family of a black banker who lived in the mostly white neighborhood. The victims' property was vandalized, threatening phone calls were made to them, and dog feces was dumped on their lawn.
4-10-86	Tilghman Island MD	Four whites were arrested for burning a cross on the property of a black family which had recently moved into the remote, mostly white area.

6-10-86	Cleveland	Constant harassment of a black family which had moved recently into an all-white neighborhood erupted into gunfire and left several whites injured. The victims had located in the area through a city-sponsored program to integrate an all-white section on the city's west side.
6-27-86	Baltimore	A black family was driven out of its home in a predominantly white Baltimore County community after the home was firebombed. A previous firebombing attempt on Aug. 24, 1985, failed.
7-6-86	Chicago	The home of a black family which had recently moved into an all-white neighborhood in Gage Park was the target of an attempted firebombing.
7-7-86	Fairless Hills PA	A Molotov cocktail thrown through the window of a black family living in an otherwise all-white neighborhood failed to ignite. The family had lived in the area for some time.
7-13-86	Seattle	A cross was burned at the home of a black woman in a mostly white neighborhood in West Seattle.
7-24-86	Fairless Hills, PA	The home of a black family in a mostly white neighborhood was destroyed in a firebombing.

8-3-86	Joelton TN	A 10-foot high cross was burned on the lawn of a black family which had recently moved into an all-white neighborhood. Three months earlier unknown persons had painted "KKK" in the road near their house. The community is a suburb of Nashville.
8-15-86	Newburg, MD	A white youth was arresteed for allegedly burning a cross in front of a black woman's home in a mostly white neighborhood.
8-24-86	Chicago	The home of a black family which had recently moved into an all-white neighborhood in the Gage Park area was set on fire. It was the second attempt to burn the family out of the neighborhood in two months.
8-30-86	Philadelphia	Three black men passing through a predominantly white neighborhood on foot were harassed and beaten by a mob of whites armed with baseball bats and broom handles. According to the victims, one of the assailants told them, "You're in the wrong neighborhood, you niggers. We don't want your type coming through here."
8-86	Toledo, OH	Two racially motivated shootings, several threats and a cross burning wracked a mostly white neighborhood which had recently experienced an influx of minority families. A white

		adult and three juveniles were arrested. About the same time, a cross was set afire in front of a duplex rented by blacks in another predominantly white neighborhood in the city.
9-8-86	Harrisburg, PA	Two whites were arrested after a cross was burned at the home of a black family which had recently moved into a predominantly white neighborhood.
9-16-86	Rolla, MO	A cross was burned at the home of a black family living in a mostly white area. Two whites were later arrested.
10-7-86	Hamilton Township, NJ	A charred cross and an effigy of a black man were found on the lawn of a house occupied by nine black athletes at a nearby community college. The residence is in a mostly white area.
11-7-86	Indianapolis	A cross was burned in front of a duplex occupied by the only two black families in an otherwise all-white neighborhood.
11-86	Toledo, OH	An interracial church which moved into a predominantly white neighborhood was victimized repeatedly during the fall. Garbage was dumped in stairwells, beer bottles smashed against the front of the building and other acts of harassment have been committed.

12-20-86	New York City	A black man was killed when a mob of young whites chased him onto a busy thoroughfare in the predominantly white neighborhood of Howard Beach in the borough of Queens. The victim and two companions were on foot in ths neighborhood after their car broke down and they walked for help. The whites yelled racial slurs and threats regarding the presence of the blacks in the workingclass white area.

The
Southern
Poverty
Law
Center

FOR RELEASE FEB. 5, 1987

FOR MORE INFORMATION,
contact Bill Stanton
or Pat Clark at 205
264-0286

The Southern Poverty Law Center today called on Attorney General Edwin Meese to form a special unit in the Department of Justice to monitor and prosecute the alarming number of cases of racist violence against minorities who move into all-white neighborhoods.

Executive Director Morris Dees made the request in a letter to Meese reporting the findings of a study conducted by the Center's Klanwatch division which indicated that so-called "move-in" violence is increasing against minorities who locate in all-white areas. The report is titled "Move-In" Violence: White Resistance to Neighborhood Integration in the 1980's.

The phenomenon, given its name by law enforcement and social workers, has worsened as middle-class blacks and other minorities have sought housing in previously all-white suburbs or neighborhoods. Incidents range from threats and vandalism to arson and firebombings.

During 1985-86, the period covered in the study, there were 45 known arson attempts and cross burnings at the homes of minorities who had recently moved into mostly white areas, Dees said, as well as hundreds of acts of vandalism, intimidation and other incidents. He singled out the recent murder of a black man in

the Howard Beach section of New York City and the violent attack on a civil rights march in Forsyth County, Ga., as two prominent manifestations of the phenomenon. In each case racist whites attacked their victims out of a desire to preserve racial segregation in their communities, Dees said. Less violent but extremely serious incidents around the nation have received little publicity, according to Dees.

"Minority families are at risk in many communities across the country from hardcore racists who see their all-white neighborhoods as the last bastions of segregation," Dees said.

Although the problem is national in scope, metropolitan areas of the North and Midwest recorded a majority of the most violent attacks. Since 1985 serious move-in violence has been reported in or around Chicago, Cleveland, Baltimore and Philadelphia as well as in Atlanta. One death was reported in a racially motivated firebombing in Cleveland in 1985.

Dees also endorsed a bill to be introduced in Congress that would require the Attorney General to collect statistics on the number of "hate violence" incidents committed nationwide. The term hate violence is short for all racially, religiously or ethnically motivated acts of violence or intimidation. Rep. Barbara Kennelly (D-Conn.) is the bill's chief sponsor. Currently no nationwide system exists for keeping track of hate violence activity, making it difficult to assess the extent of the problem and how best to respond to it, Dees said.

- 30 -

KLANWATCH is a project of the Southern Poverty Law Center established in 1980 to conduct litigation, publish educational materials and do monitoring in the area of right-wing extremist groups, particularly the Ku Klux Klan. The SPLC is a non-profit, legal and educational organization founded in 1970. The Klanwatch Project is totally funded by the SPLC, which receives its funding from contributions from individuals. No local, state or federal funding is involved.

UNITED
CEREBRAL
PALSY
ASSOCIATIONS

COMMUNITY
SERVICES
DIVISION

1522 "K" Street, NW
Suite 1112
Washington, DC
20005

202 842 1266

June 22, 1987

The Honorable Paul Simon
United States Senate
Washington, D.C. 20510

Dear Senator Simon:

United Cerebral Palsy Association is requesting your support for the Kennedy-Spector substitute from S. 558, the Fair Housing Amendments Act of 1987. UCPA represents over 180 affiliates serving individuals with cerebral palsy and other severe physical disabilities.

S. 558 extends to people with disabilities the same protections against discrimination in housing currently assured other minorities under Title VIII of the Civil Rights Act. Housing discrimination on the basis of handicaps has greatly diminished the ability of these Americans to truly become independent and integrated in society. Without this amendment, the Fair Housing Amendments of 1987 would effectively permit de facto discrimination. The right to be free from discrimination in the purchase and rental of housing and the concommitant right to be free from discrimination in obtaining financing and insurance for housing, are rights enjoyed by most Americans. For decades, however, individuals with disabilities have not enjoyed such rights.

UCPA strongly urges your support for the Kennedy-Spector substitute as it moves through mark-up. In particular, we request your endorsement of the clarification regarding discriminatory actions in the future construction of multi-family housing. You support for this legislation will assist individuals with cerebral palsy and other severe physical disabilities in achieving independence.

Sincerely,

Michael Morris
Associate Executive Director
Community Services Division

LEONARD H.
GOLDENSON
Board
Chairman

JACK
HAUSMAN
Vice
Chairman

NINE EATON
Vice
Chairman

HOWARD C.
MILLER, JR.
Vice
Chairman

GEORGE S.
DOLIM
Vice
Chairman

MARTIN
RUBENSTEIN
President

RALPH SHAPIRO
President -
Elect

WILLIAM
BERENBERG, MD
Vice
President
Medical Affairs

ALLIN W.
PROUDFOOT
Executive
Director

MICHAEL W.
MORRIS
Associate
Executive
Director

UNITED STATES CATHOLIC CONFERENCE
Department of Social Development and World Peace
1312 MASSACHUSETTS AVENUE N.W., WASHINGTON, D.C. 20005 (202) 659-6820

Office of the Secretary

April 10, 1987

The Honorable Paul Simon
United States Senate
Washington, D.C. 20510

Dear Paul:

Just a note to say I'm very sorry Bishop Malone could not make the March 31st testimony on fair housing. Even though the forces of nature were the problem, I regret the disruption it must have caused your subcommittee.

I'm very glad he was able to appear personally this week.

For your efforts in this area and in so many others, I am deeply grateful and much in admiration.

Sincerely yours,

Rev. J. Bryan Hehir
Secretary

Mee my last on.
Pursuit of the Secretary.
Mee office desire
sermon [illegible] quality
B-

UNITED STATES CATHOLIC CONFERENCE
Department of Social Development and World Peace
1312 MASSACHUSETTS AVENUE N.W., WASHINGTON, D.C. 20005 (202) 659-6820

Office of the Secretary

May 8, 1987

Hon. Paul Simon
462 Dirksen Senate Office Building
Washington, D. C. 20510

Dear Senator Simon:

I write on behalf of the United States Catholic Conference to urge your support of the Fair Housing Amendments Act of 1987 (S. 558). Bishop Malone of Youngstown, Ohio, testified before the Subcommittee on the Constitution on April 9, 1987, expressing the U. S. Catholic Conference's strong support for this legislation. I am writing to reiterate this position and to urge you to take prompt and positive action on S. 558.

The extensive evidence of unjust housing discrimination in our nation suggests the urgent need for Congress to take action on this matter. As a nation we should see to it that no one encounters the kind of discrimination that racial minorities, the handicapped, and families with children now face when seeking housing.

The inclusion of families with children under the provisions of the Fair Housing Law is a particularly important provision. Discrimination against families with children is an increasing phenomenon in the nation's housing markets. This kind of bias places an unjust burden on families, and constitutes a threat to this most basic unit of social organization. Moreover, it inflates the price of housing for families, since it limits the number of units available.

Precisely because of our commitment to human dignity and equality we condemn this type of discrimination in housing. We ask you to create effective legal and institutional mechanisms to prevent it. As you know, the aim of S. 558 is to establish a procedure that will assure prompt and effective redress for victims of housing discrimination. This legislation would provide a number of options for victims of discrimination, including a hearing before an administrative law judge. This procedure, utilized by more than 25 federal agencies, would put teeth into the law by speeding up the process. Along with the other available options - - conciliation by the parties, referral to a certified state or local agency, or private civil action - - the use of administrative law judges would create an effective and efficient enforcement mechanism against housing discrimination.

The U.S.C.C. is convinced that S. 558 will provide the necessary enforcement mechanism to help end unjust discrimination in housing. We urge your support for the bill.

Sincerely,

+ Joseph M. Sullivan

Most Rev. Joseph M. Sullivan
Auxiliary Bishop of Brooklyn
Chairman, Committee on Social Development
and World Peace

GERMANTOWN
Artery/Artery/Artery/Artery
NOW PREVIEWING
NO MONSTERS!
(or perfect Angels)
All-new, All-adult sections
at
CANTERBURY
1 MONTH FREE RENT!
See Rental Consultant For Details

- Quality built luxury garden apt. community
- Social Activities program with Social Director, Modern community center with exercise/weight room, Big Screen TV, FREE Aerobics Classes-MORE!
- 1 block-Metro Shuttle Bus

CALL TODAY
(301) 428-3918
Hrs: Mon-Sat 9-6, Sun 12-5
Dir: Take I-270 to Rte 118W (Germantown Rd). Take Rte 118W approx ¾ mi to Middlebrook Rd. Turn R & proceed ½ mile to Canterbury
Management By
Dreyfuss/Dreyfuss/Dreyfuss
EHO